TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1939

No. 236

UNITED STATES OF AMERICA FOR THE USE AND BENEFIT OF MIDLAND LOAN FINANCE COMPANY, PETITIONER,

vs.

NATIONAL SURETY CORPORATION AND PATRICK J. MALONE

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR CERTIORARI FILED JULY 28, 1939.

CERTIORARI GRANTED OCTOBER 9, 1939.

United States Circuit Court of Appeals

EIGHTH CIRCUIT.

No. 11,347

AT LAW.

UNITED STATES OF AMERICA, FOR THE USE AND BENEFIT OF MIDLAND LOAN FINANCE COMPANY, A CORPORATION, APPELLANT,

vs.

NATIONAL SURETY CORPORATION, A CORPORATION, AND PATRICK J. MALONE, APPELLEES.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MINNESOTA.

FILED OCTOBER 21, 1938

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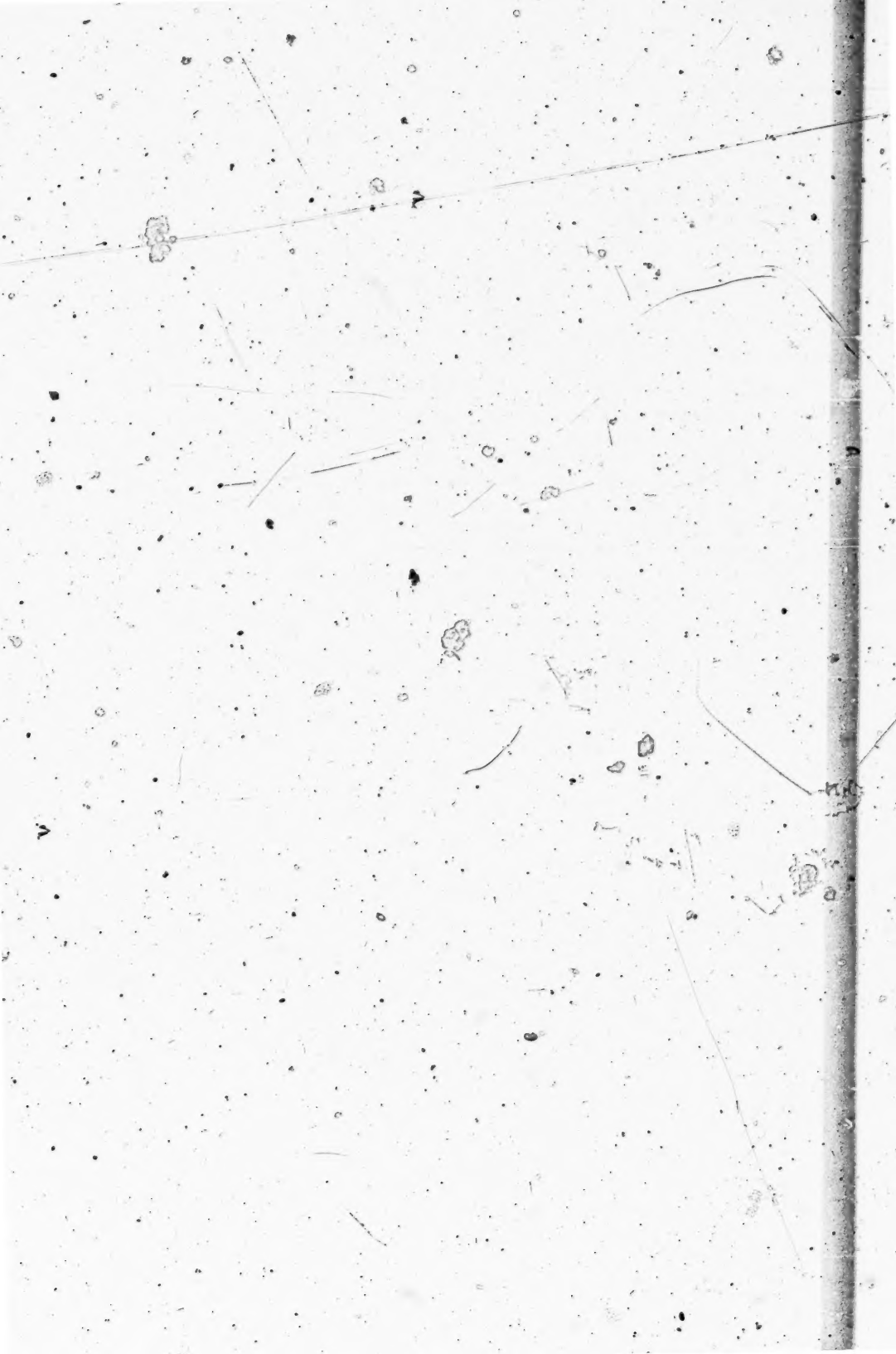

Pleas and proceedings in the United States Circuit Court of Appeals for the Eighth Circuit, at the March Term, 1939, of said Court, before the Honorable John B. Sanborn, the Honorable Seth Thomas and the Honorable Arba S. Van Valkenburgh, Circuit Judges.

Attest:

E. E. KOCH,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

(Seal)

Be it Remembered that heretofore, to-wit: on the twenty-first day of October, A. D. 1938, a transcript of record pursuant to an appeal allowed by the District Court of the United States for the District of Minnesota, was filed in the office of the Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, in a certain cause wherein the United States of America, for the use and benefit of Midland Loan Finance Company, a corporation, was Appellant, and the National Surety Corporation, a corporation, and Patrick J. Malone, were Appellees, which said transcript as prepared and printed under the rules of the United States Circuit Court of Appeals for the Eighth Circuit, under the supervision of its Clerk, is in the words and figures following, to-wit:

[fol. 1] Praecipe for Transcript and Election as to Printing.

United States District Court, District of Minnesota, Fourth Division.

United States of America, for the use and benefit of Midland Loan Finance Company, a corporation, Plaintiff,

vs.

National Surety Corporation, a corporation, and Patrick J. Malone, Defendants.

The Clerk of the above Court will prepare and forward to the United States Circuit Court of Appeals for the Eighth Circuit, a transcript of the record on appeal in the above case, consisting of the following records:

1. Bill of Complaint

2. Demurrer of defendant National Surety Corporation

3. Demurrer of defendant Patrick J. Malone

4. Order by Honorable Matthew M. Joyce overruling demurrer dated July 3, 1937, and memorandum attached thereto

5. Answer of defendant National Surety Corporation

6. Answer of defendant Patrick J. Malone

7. Reply to answer of defendant National Surety Corporation

8. Reply to answer of defendant Patrick J. Malone

9. Bill of Exceptions before Honorable Gunnar H. Nordbye, filed September 19, 1938

10. Order of Honorable Gunnar H. Nordbye, dated May 16, 1938, granting defendant National Surety Corporation's motion to dismiss, and memorandum accompanying the same

11. Order of Honorable Gunnar H. Nordbye, dated June 11, 1938, granting defendant Patrick J. Malone's motion to dismiss, and memorandum accompanying the same

12. Judgment of Dismissal dated June 14, 1938

13. Notice of Appeal

14. Petition for Appeal, Assignment of Errors, and Prayer for Reversal

[fol. 2] 15. Order allowing appeal

16. Bond on appeal

17. Citation

18. Orders extending time to file Bill of Exceptions

19. Order extending Citation

20. Praecipe and Election as to Printing

Plaintiff gives notice of its election to have the printing of such transcript of the record done under the supervision of the Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, under the rules of said Court.

Dated this 19th day of September, 1938.

LEONARD, STREET, and
DEINARD,
Attorneys for plaintiff
1036 Andrus Building
Minneapolis, Minnesota.

Service of the within Praecipe for Transcript and Election as to Printing is hereby admitted this 21st day of September, 1938.

DOHERTY, RUMBLE, BUTLER, SULLIVAN & MITCHELL,
Attorneys for National Surety Corporation.

GEORGE T. HAVEL,
By RDF
Attorney for Patrick J. Malone.

Filed September 28, 1938. Margaret L. Mullane, Clerk, By Thomas H. Howard, Chief Deputy.

[fol. 3] Complaint.

United States District Court, District of Minnesota, Fourth Division.

United States of America, for the use and benefit of Midland Loan Finance Company, a corporation, Plaintiff,

vs.

National Surety Corporation, a corporation, and Patrick J. Malone, Defendants.

Comes now Midland Loan Finance Company, use-plaintiff above named, a corporation organized under the laws of the State of Minnesota, and a citizen and inhabitant thereof, having its principal place of business in the City of Minneapolis in the above District and Division, and for its complaint against defendants and each of them alleges:

I.

Midland Loan Finance Company, the use-plaintiff herein, hereinafter for brevity designated "plaintiff", at all times hereinafter alleged and at the time of the commencement of this action was and now is a corporation duly organized and existing under and by virtue of the laws of the State of Minnesota, and a citizen and inhabitant of said State, having its office and principal place of business in the City of Minneapolis, in the above District and Division, and engaged in the finance business, and more particularly, in the purchase of negotiable paper evidencing

the purchase price of automobiles, and conditional sales contracts upon automobiles securing such paper.

II.

At all times herein mentioned, and at the time of the commencement of this action, defendant National Surety Corporation, was and now is a corporation duly organized and existing under and by virtue of the laws of the State [fol. 4] of New York, having its principal place of business in New York City, in said State, and a citizen and inhabitant of said State, and having its principal place of business for the State of Minnesota in said city of Minneapolis in the above District and Division, and duly qualified and licensed to do business in the State of Minnesota, and carrying on a bonding and insurance business for hire.

At all times hereinafter mentioned and at the time of the commencement of this action, defendant Patrick J. Malone was and now is a citizen and inhabitant of the State of Minnesota, residing at Montgomery, in the County of LeSueur, in said state.

III.

This court has jurisdiction of the above case because there is a diversity of citizenship between plaintiff and defendant National Surety Corporation, and the amount in controversy herein exceeds, exclusive of interest and costs, the sum or value of $3,000, and because this case arises under the Postal Laws of the United States.

IV.

Shortly prior to July 31, 1934 defendant Patrick J. Malone, (hereinafter for brevity designated "defendant Malone") was duly designated and appointed Acting Postmaster at the United States Post Office at Montgomery, in the County of LeSueur and State of Minnesota, effective July 31, 1934, by the Postmaster General of the United States in accordance with the Act of Congress approved March 1, 1921. Before entering upon the duties of his office, defendant Malone on July 31, 1934 duly executed the prescribed oath of office, and on August 1, 1934, as principal, with defendant National Surety Corporation as surety, duly signed, executed and delivered to the United

States of America, a Presidential Acting Postmaster's Bond, in the penal sum of $16,000, dated said day, conditioned among other things for the faithful discharge of all duties and trusts imposed on him as Acting Postmaster, either by law or by the regulations of the Post Office Department, and duly qualified as such Acting Postmaster. Thereupon on said August 1, 1934, defendant Malone duly [fol. 5] took possession and charge of said Post Office. Said oath and bond were duly transmitted to the First Assistant Postmaster General for examination, approval and filing, and on August 14, 1934 were duly approved and accepted for the Postmaster General of the United States by the First Assistant Postmaster General. Hereto attached marked "Exhibit A" and incorporated in this complaint by reference is a true and correct copy of said bond. From and after August 1, 1934 during the entire period mentioned in this complaint defendant Malone was in complete charge and control of said Post Office as Acting Postmaster thereof and responsible under said bond for the performance of his duties. Said Bond was made to the United States of America as the named obligee therein for the use, benefit and protection of all persons lawfully using the United States mails at, to, and from Montgomery, Minnesota, including plaintiff, as well as for the use, benefit and protection of the United States of America, and plaintiff, having an interest in said bond, which was designed to secure the faithful performance of the official duties of defendant Malone in the discharge of which plaintiff had and has a proper interest, and having been damaged by the failure of defendant Malone faithfully to discharge the duties and trusts imposed on him as such Acting Postmaster by law and by the regulations of the Post Office Department after the date he took charge of said Post Office, in connection with plaintiff's lawful use of the United States Mail at and to said Montgomery, Minnesota, hereby brings this action upon said bond and to recover the penalty thereof in the name of the United States of America for plaintiff's own use and benefit.

V.

At all times hereinafter mentioned, one Thomas Hunting was engaged in the automobile business, and more particu-

larly in the sale of automobiles and of negotiable paper and conditional sales contracts relating to automobiles, at Montgomery, Minnesota, under his own name and under the name of Tom Hunting Company.

[fol. 6] VI.

Some time prior to August 1, 1934, said Hunting solicited plaintiff to purchase conditional sales contracts held by him on and reserving title to automobiles sold and to be sold by him to his customers, including the promissory notes signed by the purchasers evidencing their obligation to pay the deferred instalments on said contracts, and plaintiff agreed to purchase such contracts and notes with respect to automobiles sold and to be sold by said Hunting in the usual, customary, and regular course of his business. Thereafter, said Hunting from time to time offered to sell to plaintiff automobile contracts, and notes, and on each occasion represented and warranted to plaintiff that said contracts represented and reserved title to automobiles owned by him, and by him sold in the usual, customary, and regular course of business to bona fide customers, who had taken and then had possession of such automobiles, and that said notes represented the bona fide and enforceable obligations of such purchasers to pay the deferred instalments of the purchase price of said automobiles as recorded in said contracts; that such purchasers resided in LaSueur County, Minnesota, in the trade territory adjoining and tributary to Montgomery, Minnesota; that said contracts and notes were in all respects valid and subsisting, and that the unpaid balances recited therein represented the true unpaid balances legally owing by and in fact collectible from such purchasers.

VII.

Plaintiff believed said representations and warranties to be true and did purchase from time to time commencing prior to August 1, 1934, from said Hunting automobile contracts and notes, and paid said Hunting therefor.

VIII.

Plaintiff's established and routine course of business in buying automobile contracts and notes from automobile

dealers, such as said Hunting, was as follows: Plaintiff required the dealer to furnish purchaser's statements signed by the automobile purchasers named in the automobile contracts and notes offered for sale, containing credit references so that plaintiff might ascertain the credit rec- [fol. 7] ord, financial responsibility and trustworthiness of the purchasers. Thereafter plaintiff mailed inquiries to the named credit references, requesting information as to the credit record, financial responsibility and trustworthiness of the purchasers. Upon purchasing such contracts and notes as it deemed satisfactory, plaintiff mailed notices to the automobile purchasers named in the contracts and notes stating therein that plaintiff had purchased and had become the owner of the contracts and notes and that all further payments thereon should be made directly to it, and enclosed therewith a memorandum book containing a schedule of the amounts and dates of payments as they would fall due according to the tenor of said contracts and notes.

Plaintiff did not rely solely on the representations of the dealers or their financial responsibility, but relied upon the procedure hereinbefore described to verify the warranties and representations made by the dealers as to the genuineness of sales of automobiles, the validity of the contracts and notes, and the identity, financial responsibility and trustworthiness of the automobile purchasers, and to acquire independent information about the same. Over a period of years plaintiff had determined that said procedure was necessary for its protection and adequate to insure its protection.

Therefore, in making said purchases from said Hunting, plaintiff followed said procedure according to its established and routine method of doing business, and reasonably relied thereon to investigate and verify the aforesaid representations and warranties made to it by said Hunting.

IX.

In all of the contracts and notes sold by said Hunting to plaintiff and involved in this suit, the residences of the purported automobile purchasers and credit references were given as being in said LeSueur County, in the trade

territory adjacent and tributary to Montgomery, Minnesota. All communications between plaintiff and such purported automobile purchasers and credit references were had through the United States mails, by means of letters and communications addressed by plaintiff to them at Montgomery, Minnesota, and deposited in the United States mail at Minneapolis, Minnesota, with postage pre-
[fol. 8] paid and bearing in the upper left-hand corner of each envelope containing such letters and communications plaintiff's name and return address, to-wit: No. 505 Wesley Temple Building, Minneapolis, Minnesota, and a request to return, together with a pledge to pay the return postage. Because of the distance from plaintiff's principal place of business to the postoffice addresses of said purported automobile purchasers and said credit references the foregoing practice of using the mails was necessary for the economical and efficient handling of plaintiff's business, and was reasonably adopted and relied on by plaintiff as a business practice for its protection.

X.

Some time prior to August 1, 1934, said Thomas Hunting conceived and thereafter executed a scheme of defrauding plaintiff by means of the following wrongful and unlawful acts, misrepresentations, frauds, conspiracies, confederations, agreements and violations of law:

(a) By making out false, forged and fictitious conditional sales contracts and notes falsely purporting to represent actual sales and deliveries of automobiles by said Hunting in the usual, customary and regular course of his business to actual purchasers resident in LeSueur County in the trade territory adjoining and tributory to Montgomery, Minnesota, who had taken and had possession of such purported automobiles, and by offering the same for sale to plaintiff as genuine, valid, and subsisting instruments and obligations;

(b) By falsely representing and warranting to plaintiff that such purported contracts and notes were genuine and represented actual sales and deliveries of automobiles to actual bona fide purchasers as aforesaid, whereas the

same were on the contrary false and fictitious, reciting fictitious sales of fictitious automobiles to fictitious persons;

(c) By falsely inducing plaintiff to believe that said representations and warranties were true, and by causing plaintiff to purchase such fictitious contracts and notes from time to time;

[fol. 9] (d) By making out and delivering to plaintiff in connection with such false and fictitious contracts and notes, wholly invented and fictitious purchasers' statements containing fictitious names for credit references and bearing fictitious signatures forged by him;

(e) By unlawfully intercepting at the Montgomery, Minnesota, Post Office all [cummunications] and letters which plaintiff in its aforesaid course of business mailed through the United States mails addressed to said purported purchasers named in the false and fictitious contracts and notes, and to the said purported credit references named in the purported purchasers' statements;

(f) After intercepting said mail, by sending to plaintiff wholly fictitious, forged, false and fraudulent responses to plaintiff's inquiries addressed by it to the purported credit references, in the names of the purported credit references;

(g) By conspiring and confederating with defendant Malone and his assistants and subordinates in the said Post Office at Montgomery, Minnesota, acting under his supervision and control, to intercept at said Post Office all mail communications and letters addressed and mailed by plaintiff to said purported purchasers, and said purported credit references, immediately upon the arrival of said mail at said Post Office;

(h) By unlawfully and corruptly arranging and agreeing with defendant Malone and his said assistants and subordinates that all mail communications and letters bearing upon the envelopes the return name and address of plaintiff be delivered to said Hunting directly, notwithstanding that such mail communications and letters were addressed to others than said Hunting;

(i) By unlawfully procuring defendant Malone and his said assistants and subordinates to deliver to said Hunting directly upon their arrival at said Post Office all mail, communications and letters addressed by plaintiff in the names of the fictitious purchasers and fictitious credit references;

(j) By selling such false and fictitious contracts and notes to plaintiff, and by continuing the execution of said scheme, and by continuing to sell further false and fictitious [fol. 10] contracts and notes to plaintiff in the fraudulent manner aforesaid;

(k) And by continuing with the aid, participation and connivance of defendant Malone and his said assistants and subordinates to intercept all of said mail communications and letters at said post office, whereby plaintiff was wholly prevented and disabled from investigating and/or discovering the falsity of the aforesaid representations and warranties made to it by said Hunting, and from discovering the false, fraudulent, fictitious and worthless character of said contracts and notes, and the fraud perpetrated upon it by said Hunting;

(l) By forwarding instalment payments to plaintiff in the names of said purported purchasers according to the tenor of said purported contracts and notes, out of moneys received by said Hunting from plaintiff as the purchase price of further fictitious contracts and notes sold by him to plaintiff.

XI.

Defendant Malone as Acting Postmaster of said Post Office, and his said assistants and subordinates, were charged with the duty faithfully to discharge and perform all duties and trusts imposed upon them by law, and by the regulations of the Post Office Department relating to delivery and return of mail, and, in addition, defendant Malone, as Acting Postmaster of said Post Office, was and is individually charged with responsibility and liability for any breach of said duties or trusts by any of his said assistants or subordinates.

At all times herein mentioned, the following Postal Regulations were prescribed for the government of the Post

Office Department, the conduct of its postmasters and clerks, the performance of the business of the Postal Service, and the custody and delivery of the mail, and were promulgated by Order No. 2834 on August 26, 1932 by the Postmaster General of the United States in accordance with the Act of Congress approved February 23, 1931, and were in force and effect:

Section 445, paragraph 1:

"Postmasters shall give their personal attention to the business of their offices, and shall not absent themselves [fol. 11] therefrom for a longer period than two days without written authority from the inspector in charge of the division in which the office is located. Absence for two days or less shall be reported promptly to the inspector in charge."

Section 702, paragraph 1:

"Postmasters and others in the Postal Service shall not give to unauthorized persons information concerning mail matter. They shall furnish such information to postoffice inspectors, and may furnish it also to the sender, the addressee, or the authorized representative of either when satisfactory identification has been established and the request is limited to information proper for the applicant to receive, and they may give to officers of the law upon proper identification to aid in the apprehension of fugitives from justice information regarding the addresses, return cards, or postmarks on mail matter, but shall not withhold such mail from delivery to the addressees."

Section 703, paragraph 1:

"Postmasters shall not permit to have access to any mail matter in the post office any persons except duly sworn assistants, clerks, letter carriers, post-office inspectors, and those mail contractors and carriers who, under the terms of the contract, are required to perform duties necessitating their personal presence in the post office.

"2. Mails shall not be made up or handled within reach of unauthorized persons, and such persons shall be excluded from the room appropriated to the use of the post office while the mails are being opened or made up."

Section 775, paragraph 1:

"Ordinary mail matter addressed to fictitious persons or firms, to initials, or to no particular person or firm, unless directed to be delivered at a designated place, as a post-office box, street and number, or to the care of a certain person or firm within the delivery of the post office, shall not be delivered and shall be sent to the Division of Dead Letters and Dead Parcel Post, or branches thereof, or to post offices at division headquarters of the Railway Mail Service, as prescribed by section 818, unless the envelope contains the card of the sender or a request to return, in which case such letters or packages shall be returned accordingly.

"2. Whenever a postmaster has reason to believe that a street or number, designated place, box, or address in care of another is being used by anyone for conducting, under a fictitious address, correspondence forbidden circulation in the mails, he shall promptly report the fact and the reason for his belief to the Solicitor for the Post Office Department and await his instructions, giving notice at the same time at the place where such mail matter has been received that, pending instructions from the Post Office Department, the claimant of such matter must call at the general delivery to receive it upon establishing his identity."

[fol. 12] Section 777, paragraph 1:

"Mail matter should be delivered to the person addressed or in accordance with his written order. When the addressee habitually sends for or receives his mail through his clerk, servant, agent, or some member of his family, and recognizes or acquiesces in such delivery, no written order need be required.

"2. When a person requests delivery to him of the mail of another, claiming that the addressee has verbally

given him authority to receive it, the postmaster, if he doubts the authority, may require it to be in writing, signed and filed in his office. Ordinary letters bearing the word 'Personal' in connection with the address shall be delivered as other mail for the addressee is delivered.

"4. When a postmaster is in doubt as to the identity of the addressee he may require proof, and shall exercise great care to make proper delivery, especially where mail matter appears to be of value.

"11. Any number of citizens may employ an agent and give him a written order on the postmaster for their mail; and when such order is presented to the postmaster the mail for such parties, and also mail addressed to a person in care of any such parties, shall be delivered to the agent named."

Section 804, paragraph 1:

"When the writer of any letter on which the postage is prepaid shall indorse on the outside thereof his name and address, such letter shall not be advertised, but, after remaining uncalled for at the office to which it is directed the time the writer may direct or the Postmaster General prescribe, shall be returned to the writer without additional charge for postage, and if not then delivered, shall be treated as a dead letter.

"3. The sender of a letter bearing a specific return request may by subsequent written instruction to the postmaster at the office of delivery lengthen or shorten the time originally allowed for delivery, but no letter shall be returned in less than 3 days (except as provided in sec. 730 as to the recall of mail) nor held for delivery more than 30 days.

"5. First-class, ordinary mail, specifically addressed to street and number, building, rural route, or post-office box, bearing the sender's return request, which cannot be delivered as addressed shall be given directory service; and if addresses, the correctness of which is reasonably certain, are not found, such mail shall be returned at once to

the senders without regard to the number of days specified or implied by the return cards thereon. Such mail shall not be placed in the general delivery nor held to await call."

Section 805, paragraph 1:

"Ordinary mail of the first class (except that described in par. 5 of sec. 804 and single postal cards and post cards), bearing the name and address of the sender without a request specifying a number of days, which after proper [fol. 13] service remains undelivered shall not be advertised but shall be returned to the sender at the expiration of—

Five days if intended for delivery by village or rural carrier.

Ten days if intended for general delivery service at an office having city carrier service.

Fifteen days from offices not having city carrier service unless intended for delivery by village or rural carrier."

Section 810:

"Upon every undelivered article of mail matter shall be indorsed or stamped the reason for nondelivery, using a term that is applicable and easily understood, such as: 'Moved—no address,' 'Unknown at address,' 'No such number,' 'No such street', 'Refused,' 'Deceased', 'Firm dissolved—no order', 'In dispute', 'House quarantined,' or such other terms as clearly explains the failure of delivery; and when no other reason can be ascertained the matter should be indorsed 'Unclaimed'. At offices having city or village delivery service, mail properly distributed to a carrier, but which he is unable to deliver, shall be indorsed by the carrier with the correct reason for nondelivery and the indorsement shall include the initials of the carrier and the number of the route served by him. In indorsing or stamping undelivered matter the original address or postmark shall not be defaced or obscured."

Section 826, paragraph 1:

"All matter unclaimed by the addressees and undelivered matter of every character reaching the Division of Dead Letters and Dead Parcel Post and the branches thereof shall, as far as circumstances and conditions permit, be returned to senders, except such as is obviously of no value or is unmailable under any provision of law, which shall be disposed of as the First Assistant Postmaster General may direct. All registered matter shall be returned to the senders upon payment of any postage due thereon required to be paid before transmission."

Section 933:

"The regulations as to the delivery of mail matter shall apply to the delivery of such matter by letter carriers, except where inapplicable or as otherwise modified herein."

Section 934:

"Carriers shall be careful to deliver mail to the persons for whom it is intended, or to some one authorized to receive it. They shall, in case of doubt, make inquiry with the view of ascertaining the owner. Failing in this, the mail shall be returned to the office, to be disposed of as the postmaster may direct."

Section 935, paragraph 1:

"Carriers shall not deliver mail matter to patrons in the street unless such delivery can be made without unreasonable delay."

[fol. 14] "5. Mail matter intrusted to carriers shall not be exhibited to persons other than those addressed, except on the order of the postmaster or some one authorized to act for him.

"8. Carriers shall not throw away or improperly dispose of mail matter, however trifling or unimportant it may appear to them."

That reference is hereby made to "Postal Laws and Regulations of the United States of America, Edition of 1932, in effect October 1, 1932" for the foregoing postal regulations.

Said Postal Laws and Regulations were enacted and promulgated for the benefit and protection of all persons lawfully using the United States mails, including plaintiff.

At all times herein mentioned, defendant Malone and his said assistants and subordinates were under the duty of delivering to any existing named addressee resident in Montgomery, Minnesota or vicinity all mail addressed to them at Montgomery, Minnesota, and in the case of mail addressed to fictitious persons, of refraining from delivering the same to anyone, except the sender thereof, and defendant Malone and his said assistants and subordinates were entrusted with said mail for the purpose of performing said duties.

XII.

Notwithstanding said duties and trusts, but wholly disregarding the same, and in violation of the United States Postal Laws and regulations and in breach of the aforesaid bond, Exhibit A, defendant Malone and his said assistants and subordinates regularly, customarily, wilfully, negligently and wrongfully delivered to said Hunting all of the mail communications and letters addressed by plaintiff to said fictitious persons at Montgomery, Minnesota, and wrongfully failed to make any attempt to, and in fact did not, deliver the same to the addressees named thereon nor return the same to plaintiff, notwithstanding that they well knew and would in the exercise of reasonable diligence have known that none of the same were in fact addressed to said Hunting or to his care, and that the same in each instance were clearly addressed to names other than said Hunting, and that said names of said addressees were not the names of real persons resident in Montgomery, Minnesota, or vicinity, but were fictitious names.

[fol. 15]

XIII.

Between the dates of August 1, 1934, and April 27, 1935, said Thomas Hunting pursuant to the aforesaid scheme to defraud plaintiff, sold plaintiff and plaintiff purchased and paid said Hunting, for eighty-three (83) false and fictitious contracts and notes, listed in Exhibit B attached hereto and by this reference made a part hereof. Said Exhibit B shows the name of the purported purchaser in each contract, the date of purchase, purported address of each purported pur-

chaser, the original principal amount of each contract and note, the uncollected balance thereof, and the type, motor and serial number of the automobile purported to be covered by each purported conditional sales contract.

The aggregate unpaid balance of said eighty-three contracts is the sum of $34,997.03. Said Hunting died January 13, 1936, and both said Hunting and his estate were and are insolvent and any claim or judgment against him or his estate is wholly uncollectible; and said eighty-three purported contracts and notes are fictitious and do not represent any valid obligation on the part of anyone to pay the amounts recited therein and are worthless and uncollectible.

XIV.

As a proximate result of defendant Malone's breach of duty and trust and violations of the Postal Laws and Regulations aforesaid, said Hunting was enabled to and did carry on and execute his fraudulent scheme aforesaid, and was enabled to and did intercept at said Post Office all mail communications and letters addressed and mailed by plaintiff to the purported purchasers shown in Exhibit B, and to the purported credit references in connection therewith, and was enabled to and did give forged and fictitious credit responses to plaintiff in the names of the purported credit references in said purported purchasers' statements; and was enabled to and did intercept at said Post Office all notices and memorandum books mailed by plaintiff to [fol. 16] the purported purchasers shown in Exhibit B, and was enabled to and did make payments in the names of said purported purchasers; and was enabled to and did offer and sell said contracts and notes shown in Exhibit B to plaintiff; and was enabled to and did induce plaintiff to believe that said contracts and credit references were in all respects regular and genuine, and to prevent plaintiff from discovering the fraud so practiced upon it. On or about May 1, 1935, plaintiff for the first time discovered the aforesaid fraud.

Had defendant Malone and his assistants and subordinates at said Post Office complied with, and discharged

and performed the duties and trusts imposed upon them by the postal laws of the United States and by the regulations of the Post Office Department, plaintiff would have discovered the false, forged or fictitious character of the contracts and notes tendered to it for purchase by said Hunting, and said Hunting would not have been able either to effectuate or to continue his aforesaid scheme, and said Hunting was enabled to and did effectuate and continue the same, solely by reason of, as a result of, and on account of, the continued violations and breaches aforesaid of defendant Malone and his said assistants and subordinates.

XV.

As a proximate result of the aforesaid violations and breaches of duty and trust by defendant Malone, plaintiff was and is damaged in the amount of $34,997.03.

The aforesaid violations and breaches of duty and trust constituted and constitute breaches of the conditions of said bond, Exhibit A. Plaintiff was and is a person for whose use, benefit, and protection said bond was given, and by reason of the breaches aforesaid resulting proximately in the damage to plaintiff as aforesaid, defendant National Surety Corporation is indebted to plaintiff in the sum of $16,000, being the full penalty thereof, together with interest thereon as allowed by law.

[fol. 17] Wherefore, plaintiff prays judgment against Defendant National Surety Corporation in the sum of Sixteen Thousand Dollars ($16,000) together with interest thereon according to law from and after May 1, 1935, together with its costs and disbursements herein, and against defendant Patrick J. Malone, in the sum of Thirty-four Thousand Nine Hundred Ninety-seven and 03/100 Dollars ($34,997.03), with interest thereon according to law from and after May 1, 1935, together with its costs and disbursements herein.

LEONARD, STREET & DEINARD,
Attorneys for Midland Loan Finance Company,
1056 Andrus Building,
Minneapolis, Minnesota.

Dated: July 14, 1936.

[fol.18] **Exhibit A.**

3 7-24-34.

Post Office Department

Bond of Presidential Acting Postmaster

Know All Men By These Presents, That we, Patrick J. Malone, of Montgomery, in the County of Le Sueur, State of Minnesota, as principal, and National Surety Corporation, a corporation of New York, as surety, do hereby bind ourselves, our heirs, executors, administrators, successors, and assigns, jointly and severally, to pay to the United States of America the sum of Sixteen thousand dollars ($16,000).

In Witness Whereof we have hereunto subscribed our names and affixed our seals this 1st day of August, in the year one thousand nine hundred and thirty-four.

Whereas the above-bound Patrick J. Malone took charge of the post office at Montgomery on August 1st, 1934, has been appointed acting postmaster at the office aforesaid, by the Postmaster General in accordance with the act approved March 1, 1921, and has duly executed the prescribed oath of office.

Now the Condition of This Obligation Is, That if the said Patrick J. Malone shall on and after the date he took charge of the post office faithfully discharge all duties and trusts imposed on him as acting postmaster either by law or by the regulations of the Post Office Department, and shall perform all duties as fiscal agent of the Government imposed on him by law or by regulation of the Treasury Department made in conformity with law, and shall also perform all duties and obligations imposed upon or required of him by law, or by regulation made pursuant to law, in connection with the Postal Savings System, then this obligation shall be void; otherwise, of force.

PATRICK J. MALONE, (Seal)

Signed and sealed in the presence of—

Wm. M. Kozel,
(Witness to signature of
acting postmaster)

NATIONAL SURETY CORPORATION,
By L. A. Green, Its Attorney-in-fact,
(L. A. Green
Agency at St. Paul, Minnesota.

S. Loeffelholz,
(Witness to signature of officer
or agent of surety company)

C. Whythe.
(Seal of Surety Company)

Bond accepted Aug. 14, 1934
for the Postmaster General.

By W. W. HOUES,
First Assistant Postmaster General.

[fol. 19] Exhibit B

Name of Purchaser	Date of Purchase	Address of Purchaser	Original Principal Amount of contract and note	Uncollected balance	Type	Motor No.	Serial No.
Bendzick, Michael	Oct. 22, 1934	Montgomery	641.76	412.56	'34 Chrysler Sedan	CA25923	6672284
Ambrose, Frank F.	Jan. 2, 1935	"	336.48	252.36	'33 Plymouth Coach	PD93476	208701
Augsperger, Albert	Feb. 27, 1935	"	507.60	465.30	'35 Ford 4 Door Sedan	18-1521096	
Bergman, John	Feb. 18, 1935	"	598.80	548.90	'35 Plymouth 4-door sedan	PJ19796	1039220
Bevans, Joseph	Sept. 21, 1934	"	336.48	168.24	'33 Ford Tudor	18-213272	
Bjornson, Lawrence	Jan. 28, 1935	"	592.80	494.00	'35 Plymouth Sedan	PJ6926	2401147
Boumon, Frank F.	March 16, 1935	"	456.00	456.00	'35 Ford Coach Sedan	1384726	
Bounderson, Anna M	Dec. 11, 1934	"	576.00	432.00	'35 Plymouth/	PJ4675	2309296
Bounderson, Carl	Feb. 27, 1935	"	613.76	569.92	" " "	PJ6926	2401147
Brandt, Adolph	Apr. 21, 1935	"	406.08	406.08	'34 Ford Truck	18-750407	
Carlson, Swen O.	Nov. 5, 1934	"	690.00	402.50	'34 Chrysler Sedan	CA23781	6670246
Carney, Charles E.	Oct. 2, 1934	"	707.00	404.00	'34 Chrysler Sedan	CA18621	6665973
Clark, John C.	March 18, 1935	"	592.64	592.64	'35 Plymouth Tudor	PJ145918	2500594
[illegible]	Nov. 5, 1934	"	567.00	364.50	'34 Plymouth Sedan	PF84609	1935464
Engdahl, Oscar	Oct. 27, 1934	"	393.60	229.60	'34 Ford pickup	18-758568	
Fillrath, Hubert	Aug. 31, 1934	"	336.48	140.20	'33 Chevrolet Coach	3947414	CA1077490
Fuhrman, Frank	Dec. 15, 1934	"	189.60	142.20	'30 Ford Tudor	A2877062	
Halverson, Elmer	Apr. 6, 1935	"	628.16	628.16	'35 Plymouth Sedan	PJ175292	2522065
Hinderschied, Peter	Nov. 19, 1934	"	187.00	130.90	'31 Oakland Sedan	297667	283255
Hoey, James	Feb. 26, 1935	"	829.60	777.75	'35 Chrysler Brom	CZ3821	6700874
Hoffmeister, Edw.	Sept. 27, 1934	"	555.38	317.36	'34 Plymouth Sedan	PE2381832	213302
Holicky, Edw. G.	Jan. 1, 1935	"	587.40	440.55	'35 Ford Sedan	18-1247809	
Huebner, William	March 16, 1935	"	711.04	711.04	'35 Chrysler Brom	C6-7746	6807158

						Sedan		
Carney, Charles E.	Oct. 2, 1934	"	707.00	404.00	'34 Chrysler	CA18621	6665973	
					Sedan			
Clark, John C.	March 18, 1935	"	592.64	592.64	'35 Plymouth	PJ145918	2500594	
					Tudor			
[illegible], Ralph	Nov. 5, 1934	"	567.00	364.50	'34 Plymouth	PF84609	1935464	
					Sedan			
Engdahl, Oscar	Oct. 27, 1934	"	393.60	229.60	'34 Ford pickup	18-758568		
Fillrath, Hubert	Aug. 31, 1934	"	336.48	140.20	'33 Chevrolet	3947414	3CA1077490	
					Coach			
Fuhrman, Frank	Dec. 15, 1934	"	189.60	142.20	'30 Ford Tudor	A2877062		
Halverson, Elmer	Apr. 6, 1935	"	628.16	628.16	'35 Plymouth	PJ175292	2522065	
					Sedan			
Hinderschied, Peter	Nov. 19, 1934	"	187.00	130.90	'31 Oakland	297667	283255	
					Sedan			
Hoey, James	Feb. 26, 1935	"	829.60	777.75	'35 Chrysler	CZ3821	6700874	
					Brom			
Hoffmeister, Edw.	Sept. 27, 1934	"	555.38	317.36	'34 Plymouth	PE2381832	213302	
					Sedan			
Holicky, Edw. G.	Jan. 1, 1935	"	587.40	440.55	'35 Ford Sedan	18-1247809		
Huebner, William	March 16, 1935	"	711.04	711.04	'35 Chrysler	C6-7746	6807158	
					Brom			
Hughes, Daniel	Dec. 1, 1934	"	707.00	505.00	'34 Chrysler	CA24484	6671693	
					Sedan			
Husby, Joe J.	March 23, 1935	"	765.60	765.60	'35 International			
					Truck	21312	8658	
Innes, Ervin R.	April 20, 1935	"	558.60	558.60	'35 Ford Sedan	18-1378116		
	Feb. 12, 1935	"	550.64	485.87	'35 Ford Sedan	18-1442021		
					Sedan			
Koch, Matt A.	Jan. 8, 1935	"	613.76	482.24	'34 Chrysler/	CA24848	6672057	
Kohler, John Sr.	Nov. 14, 1934	"	690.00	460.00	" " "	Ca24183	6670846	
Kohler, Wm. O.	Sept. 5, 1934	"	633.00	263.75	'34 Chrysler	CA10575	6658564	
					Brom			
Latzke, George	Feb. 4, 1935	"	805.92	705.18	'35 Chrysler	6703606	CZ1585	
					Sedan			
Lennon, Wm. G.	Jan. 22, 1935	"	456.00	380.00	'35 Ford Coupe	18-1349023		
Lockwood, Ralph	Jan. 14, 1935	"	758.40	663.60	'35 Chrysler	CZ1138	6800596	
					Coupe			
Lund, Oscar	Apr. 20, 1935	"	417.60	417.60	'33 Dodge Sedan	DP63810	3637649	
Lund, Carl	Apr. 13, 1935	"	592.64	592.64	'35 Plymouth	PJ185345	2530229	
					Sedan			
Lundberg, Carl E.	Sept. 6, 1934	"	539.76	224.90	'34 Ford Sedan	18-1132418		

[fol. 20]

Mauer, Henry	Feb. 13, 1935	Montgomery	553.20	507.10	'35 Plymouth Tudor	PJ25677	1045101
M——th, Jerome	March 9, 1935	"	570.00	522.50	'35 Chevrolet Sedan	4804932	1EA011286
Monnahan, Louis J.	March 21, 1935	"	711.04	711.04	'35 Chrysler Sedan	CZ1948	6704913
Morford, Edw. J.	Aug. 20, 1934	"	574.88	323.37	'34 Plymouth Coach	PE187472	2366806
Munger, Albert	Feb. 4, 1935	"	417.60	348.00	'33 Chrysler Coach	CO10849	6585757
Nehlig, Julius	Apr. 5, 1935	"	525.00	525.00	'35 Ford Tudor	18-1499987	
Nyquest, Henry	March 9, 1935	"	840.00	780.00	'35 Chrysler Sedan	CZ7029	6705078
Osterman, Paul	Jan. 30, 1935	"	690.00	575.00	'35 Chrysler Brom	C6-3328	6602063
Patterson, Ray E.	Jan. 19, 1935.	"	496.20	413.50	'35 Ford Coupe	18-1304849	
Patzel, Otto H.	Aug. 25, 1934	"	560.00	280.00	'34 Plymouth Coach	PE206668	2374714
Peschken, Charles	Apr. 22, 1935	"	592.64	592.64	'35 Plymouth Sedan	PJ186276	2531726
Peterson, Raymond	Jan. 11, 1935	"	711.04	622.16	'35 Chrysler Sedan	Cz1247	6801734
Rademacher, Claude	Apr. 1, 1935	"	794.08	794.08	'35 Chrysler Brom	C6-10375	6808637
Read, Walter	Nov. 2, 1934	"	244.80	142.80	'32 Ford Tudor	516986	
Roberts, Glen	Nov. 12, 1934	"	459.00	306.00	'34 " "	18-761394	
Ruppert, Louis	Apr. 1, 1935	"	592.64	592.64	'35 Plymouth Coupe	PJ154649	2507760
R——ing, George	Aug. 13, 1934	"	730.38	365.19	'34 Chrysler Coupe	CZ1847	6650609
Sames, Matt	Sept. 17, 1934	"	648.00	405.00	'34 Chrysler Brom	CZ19392	6721275
Schmidt, Geo. A.	Sept. 24, 1934	"	266.88	133.44	'32 Chevrolet Coach	3333195	a1BA0837043
Schmidt, Martin	March 16, 1935	"	592.64	592.64	'35 Plymouth Sedan	PJ130741	2488597
Schneider, Anton	Aug. 9, 1934	"	592.64	333.36	'34 Plymouth Sedan	PE186572	2357807
Schrank, August	Aug. 4, 1934	"	473.40	157.80	'34 Ford Tudor	18-983504	
Schultz, Roy	Aug. 11, 1934	"	452.40	188.50	'33 Chrysler Coach	C010753	6584852
Senell, David	Aug. 1, 1934	"	304.68	101.56	'33 Plymouth Sedan	PC53533	1812245
Seoffker, Robert	Dec. 14, 1934	"	530.40	397.80	'34 Ford Delivery	18-960865	
Simonette, Lenard	Oct. 25, 1934	"	266.88	155.68	'32 Ford Tudor	B5130724	
Spaetgens, Mike	Oct. 24, 1934	"	507.60	296.10	'34 " Coupe	18-1190854	
Stanek, Leonard	Mar. 22, 1935	"	616.32	577.60	'35 Chevrolet Sedan	4832570	a1EA021206
Stein, Lester	Apr. 15, 1935	"	628.16	628.16	'35 Plymouth Sedan	PJ179464	2525011
Sterling, Edward	Jan. 7, 1935	"	462.00	346.50	'34 Ford Coach	18-1127817	
Struck, August	Nov. 26, 1934	"	530.40	353.60	'34 Plymouth Sedan	PF876138	1938473

						Sedan		
Schneider, Anton	Aug. 9, 1934	"	592.64	333.36	'34 Plymouth Sedan	PE186572	2357807	
Schrank, August	Aug. 4, 1934	"	473.40	157.80	'34 Ford Tudor	18-983504		
Schultz, Roy	Aug. 11, 1934	"	452.40	188.50	'33 Chrysler Coach	C010753	6584852	
Senell, David	Aug. 1, 1934	"	304.68	101.56	'33 Plymouth Sedan	PC53533	1812245	
Seoffker, Robert	Dec. 14, 1934	"	530.40	397.80	'34 Ford Delivery	18-960865		
Simonette, Lenard	Oct. 25, 1934	"	266.88	155.68	'32 Ford Tudor	B5130724		
Spaetgens, Mike	Oct. 24, 1934	"	507.60	296.10	'34 " Coupe	18-1190854		
Stanek, Leonard	Mar. 22, 1935	"	616.32	577.60	'35 Chevrolet Sedan	4832570	a1EA021206	
Stein, Lester	Apr. 15, 1935	"	628.16	628.16	'35 Plymouth Sedan	PJ179464	2525011	
Sterling, Edward	Jan. 7, 1935	"	462.00	346.50	'34 Ford Coach	18-1127817		
Struck, August	Nov. 26, 1934	"	530.40	353.60	'34 Plymouth Sedan	PF876138	1938473	
Stube, Edward	Dec. 12, 1934	"	576.80	468.66	'35 " "	PJ5743	2400354	
Sullivan, John	Apr. 15, 1934	"	711.04	711.04	'35 Chrysler Brom	C6-11887	6810006	
Thompson, Martin	Oct. 15, 1934	"	484.80	282.80	'34 Ford Sedan	18-1194285		
Thorne, Albert	Apr. 2, 1935	"	348.00	348.00	'33 Plymouth Sedan	PD32437	2029468	
Thyson, J. Henry	Dec. 11, 1934	"	242.00	169.40	'31 Chrysler Sedan	CM4465	6523581	
Trapp, James E.	Apr. 23, 1935	"	583.38	583.38	'35 Plymouth Sedan	PJ197275	2857612	
Uhler, Milo	Jan. 16, 1935	"	576.00	480.00	'35 Plymouth Sedan	PJ7452	2401190	

[fol. 21]

Waajatke, Jos. R.	Jan. 3, 1935	Montgomery	556.96	452.53	'35 Plymouth Coach	PJ5782	2400437	
Walters, Russell	August 25, 1934	"	547.20	228.00	'34 Plymouth Sedan	PE206251	2374234	
Wietzke, William	Dec. 1, 1934	"	278.40	185.60	'34 Plymouth Sedan	PC113051	1863452	
Warponn, Norman	Aug. 18, 1934	"	484.80	202.00	'34 Ford Tudor	18-775878		
Whitesides, Louis	Aug. 1, 1934	"	711.04	355.52	'34 Chrysler Sedan	CA19961	6701095	
Wollers, Albert S.	Sept. 20, 1934	"	567.00	324.00	'34 Plymouth Sedan	PE208744	2395826	
Zacher, Charles	Nov. 17, 1934	"	519.00	346.00	'34 Ford Sedan	18-1195117		
Zieher, Albert	Feb. 16, 1935	"	584.40	535.70	'35 " "	18-1484756		
Zimmer, Ernest D.	Sept. 15, 1934	"	527.40	263.70	'34 " "	18-1165166		

Filed October 2, 1936. MARGARET L. MULLANE, Clerk, By Thomas H. Howard, Chief Deputy

[fol. 22] (Demurrer of Defendant, National Surety Corporation, to Complaint.)

The defendant National Surety Corporation hereby demurs to plaintiff's complaint for the reason that it appears therefrom:

1. That there is a defect of parties plaintiff or defendant.

2. That the facts stated do not constitute a cause of action.

DOHERTY, RUMBLE & BUTLER,
Attorneys for Defendant National Surety Corporation,
E-1006 First National Bank Bldg.,
Saint Paul, Minnesota.

[fol. 23] State of Minnesota,
County of Ramsey,—ss.:

Emma H. Stoven, of said County and State, being duly sworn, deposes and says that she is a clerk in the office of Doherty, Rumble and Butler, the attorneys for National Surety Corporation, a corporation, one of the defendants in the within entitled action; that on the fourth day of November, 1936, she served the annexed Demurrer by depositing a true and correct copy of the same in the United States Mails at the City of Saint Paul, Minnesota, properly enveloped, with postage prepaid thereon, and addressed to Messrs. Leonard, Street & Deinard, Attorneys at Law, 1036 Andrus Building, Minneapolis, Minnesota; that said Leonard, Street & Deinard are the attorneys for the plaintiff in said action and reside at the City of Minneapolis, Minnesota.

EMMA H. STOVEN.

Subscribed and sworn to before me this fifth day of November, 1936.

ADELLA WARDRUM,
Notary Public,
Ramsey County, Minn.

(Notarial Seal)

My Commission expires Oct. 22, 1937.

(Endorsed): Filed December 2, 1936. Margaret L. Mullane, Clerk, By Thomas M. Howard, Chief Deputy.

[fol. 24] (Demurrer of Defendant, Patrick J. Malone, to Complaint.)

Comes now the defendant, Patrick J. Malone, and demurs to the Complaint of plaintiff herein, on the following grounds:

I.

That said plaintiff, Midland Loan Finance Company, has not legal capacity to sue, in this, that said Midland Loan Finance Company, by, and through their attorneys, for their own benefit, individually, purport to bring this action, for and in the name of the United States of America, the only party having legal capacity to bring said action, having brought said action without the permission, or consent, of said United States of America.

II.

That there is a defect in parties plaintiff, by reason of the omission of the United States of America, the obligee, named in the bond alleged, to have been breached in plaintiff's complaint herein; in that the United States of America, is a necessary party, and the only party able to maintain an action for breach of the bond above mentioned.

III.

That several causes of action have been improperly united as follows, to-wit: That said complaint alleges a cause of action for breach of a bond of the defendant, Patrick J. Malone, and National Surety Company, a corporation, defendants, running to the United States of America, [fol. 25] as alleged in plaintiff's complaint herein; that said cause of action can be maintained only by the United States of America, obligee, named in said bond, and plaintiff has no cause of action thereon; that said complaint purports to alleging a cause of action to recover damages for the purported negligence of Patrick J. Malone.

IV.

That the complaint does not allege facts sufficient to constitute a cause of action.

Wherefore, said defendant, Patrick J. Malone, prays that said demurrer to the complaint of plaintiff herein, be sustained on the grounds hereinbefore set forth.

GEORGE T. HAVEL,
Attorney for defendant,
Patrick J. Malone,
Le Center, Minnesota.

Due and personal service of the within Demurrer of Defendant admitted this 4th day of November, 1936.

LEONARD, STREET & DEINARD,
Attorney for Plaintiff,
Midland Loan Finance Co., a corp.

Filed November 4, 1936. Margaret L. Mullane, Clerk. By Thomas H. Howard, Chief Deputy.

[fol. 26] (Order Overruling Demurrers to Complaint.)

United States District Court, District of Minnesota, Fourth Division.

United States of America, for the use and benefit of Midland Loan Finance Company, a corporation, Plaintiff,
No. 3681. vs. Law.
National Surety Corporation, a corporation, and Patrick J. Malone, Defendants.

This matter came on before the court at a special term thereof held in the City of Minneapolis on the 14th day of December, 1936, on demurrers of the defendants to the complaint. There were the following appearances: Messrs. Leonard, Street & Deinard on behalf of Midland Loan Finance Company; Mr. George T. Hovel on behalf of defendant Patrick J. Malone; and Doherty, Rumble, & Butler on behalf of National Surety Company.

The demurrers of the defendants are alike in substance and urge that there exists a defect of parties plaintiff or

defendant and that the facts stated do not constitute a cause of action.

Briefly, the complaint alleges that defendant Malone was acting Postmaster at Montgomery, Minnesota, under authority of and amenable to law and the Post Office regulations. One Hunting was an auto dealer at the same place engaged in an unlawful practice of making out false and forged conditional sales contracts and notes, which Hunting tendered for sale to the Midland Company. In order to determine the worth of such contracts and notes before buying, the Midland Company mailed letters to fictitious persons supplied as credit references for the reputed purchasers. That Malone in violation of law and duty, regularly, customarily, negligently and wrongfully gave such [fol. 27] letters to Hunting, whereby the latter was enabled to forge replies to such letters, deceive the Midland Company and ultimately to make payments in accordance with the letters and schedules so intercepted. That the Midland Company, without knowledge of the foregoing acts by Malone in the interest of Hunting, innocently relied upon the replies received believing them to be genuine, and thereupon purchased contracts and notes from Hunting. That the Midland Company was prevented from discovery of the Hunting wrongful conduct and the deception practiced by him because of Malone's alleged deceit and breach of duty, which breach the Midland Company claims is actionable on account of damages proximately resulting therefrom to it. Recovery is sought against the National Surety Company because of a bond which it wrote for Malone, such bond being required by statute and conditioned as follows:

"Now the condition of this obligation is, That if the said Patrick J. Malone shall on and after the date he took charge of the post office faithfully discharge all duties and trusts imposed on him as acting postmaster either by law or by the regulations of the Post Office Department, and shall perform all duties as fiscal agent of the Government imposed on him by law or by regulation of the Treasury Department made in conformity with law, and shall also perform all duties and obligations imposed upon or required of him by law, or by regulation made pursuant to

law, in connection with the Postal Savings System, then this obligation shall be void; otherwise, of force."

The obligee named in the bond is the United States. This action rests upon the alleged breach of the first of the three clauses incorporated in the bond, to wit, to "faithfully discharge all duties and trusts imposed on him as acting Postmaster either by law or by the regulations of the Post Office Department."

The defendants insist that consent of the Government to maintain the action is a prerequisite and that the damages are not proximate but remote. While the questions presented by the two demurrers are questions of law, and while doubt may exist as to the right of the Midland Company to maintain the action in the name of the United States, the case of U. S. vs. Howard, 184 U. S. 676, involving recovery on a United States District Court clerk's [fol. 28] bond where Government consent was not obtained, seems to support the Midland Company's claim. On argument it appeared that the Midland Company had notified the Attorney General of the United States of the pendency of the action. It further appeared that Malone, following the events here recited, was made a regular postmaster.

The evidence in detail bearing on the question of the causal relation between Malone's alleged delinquencies and the claimed losses of the Midland Company would be enlightening and valuable to a court in passing upon whether the damage claimed was proximate or remote. Not being prepared at this time to say that a cause of action does not exist, and viewing the matter as one of Federal law, and believing that with the submission of all the evidence a just determination can the more easily be ascertained, and not attempting here an analysis of the cases presented by the very able briefs submitted, I have concluded that the demurrers should be overruled. Although it was an equitable proceeding and involved the question of jurisdiction, support in principle is found for the foregoing conclusion in the late opinion of the Circuit Court of Appeals of this circuit in the case of Guy A. Thompson vs. Terminal Shares, etc., et al., 89 Fed. (2) 652, wherein Judge Gardner adopted language from Winget vs. Rockwood, 69 Fed. (2) 326, as follows:

"A suit should not ordinarily be disposed of on such a motion unless it clearly appears from the allegations of the bill that it must ultimately, upon final hearing, be dismissed. To warrant such dismissal, it should appear from the allegations that a cause of action does not exist, rather than that a cause of action has been defectively stated. * * * That rule of procedure should be followed which will be most likely to result in justice between the parties, and, generally speaking, that result is more likely to be attained by leaving the merits of the cause to be disposed of after answer and the submission of proof, than by attempting to deal with the merits on motion to dismiss the bill."

The demurrers are overruled, with leave to answer granted. It is so ordered. Exception granted.

MATTHEW M. JOYCE,
United States District Judge.

Dated July 3, 1937.

Filed July 3, 1937. Margaret L. Mullane, Clerk. By Thomas H. Howard, Chief Deputy.

[fol. 29] (Answer of Defendant, National Surety Corporation.)

The defendant National Surety Corporation for its separate answer to the complaint of the plaintiff herein:

I.

Alleges it has no knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs numbered I, V, VI, VII, VIII, IX, X, and XIII of plaintiff's complaint, and therefore denies all such allegations. With respect, however, to the allegations contained in subdivisions (g), (h), (i), and (k) of paragraph X, it is affirmatively informed and believes that all allegations therein as to conspiracy, confederation, arrangement, or agreement between Thomas Huntington and the defendant Patrick J. Malone and his assistants and subordinates, and all allegations of aid, participation, and connivance of the defendant Malone, his assistants and subordinates, in the alleged fraudulent schemes and practices of said

Thomas Huntington are wholly untrue, and upon information and belief this defendant alleges that if during the [fol. 30] period referred to in the complaint any mail matter deposited by the plaintiff was from the post-office at Montgomery, Minnesota, delivered to others than the addressees, such delivery was by subordinate clerks in said office innocently made and in justifiable belief that such delivery was authorized by the addressees of such mail.

II.

Admits the allegations contained in paragraph II of said complaint, and admits that the court designated in the complaint has jurisdiction of the action, and admits that on or about August 1, 19[illegible], the defendant Patrick J. Malone was appointed postmaster for the United States Post-Office at Montgomery, in the County of Le Sueur and State of Minnesota, and that to qualify as such the said Malone, as principal, and this answering defendant, as surety, did execute and deliver to the United States of America a bond, of which Exhibit A attached to plaintiff's complaint is a true and correct copy, and that said bond was approved by or on behalf of the Postmaster General of the United States.

Expressly denies that said bond was for the use, benefit, and protection of all persons lawfully using the United States mails at, to, and from Montgomery, Minnesota, including plaintiff, and on the contrary alleges that said bond was for the use, benefit, and protection of the United States of America only.

III.

Admits that the defendant Patrick J. Malone, while acting as postmaster of the post-office at Montgomery, Minnesota, and his assistants and subordinates, were charged with such duties as were imposed upon them as such by the then existing laws and regulations of the Post-Office Department of the United States.

[fol. 31] Admits that during the period referred to in paragraph XI of plaintiff's complaint, there were in force and effect certain regulations promulgated by the Postmaster General of the United States, of which true copies are set forth in said paragraph.

IV.

Alleges that this action was commenced without the consent or authority of the United States or of its Postmaster General or Postal Department, and that no consent to the prosecution or maintenance of the action by the United States or the Postmaster General or Postal Department has ever been granted.

V.

Except as hereinbefore admitted, denied, or otherwise pleaded, this answering defendant denies each and every allegation contained in plaintiff's complaint.

Wherefore, this answering defendant prays that plaintiff take nothing by this action as to it, but that it have judgment herein against the plaintiff upon the merits, including judgment for its costs and disbursements incurred herein.

DOHERTY, RUMBLE, BUTLER, SULLIVAN & MITCHELL,
Attorneys for Defendant National Surety Corporation,
E-1006 First National Bank Building, Saint Paul, Minnesota.

Filed July 24, 1937. Margaret L. Mullane, Clerk. By Thomas H. Howard, Chief Deputy.

[fol. 32] (Answer of Defendant, Patrick J. Malone.)

Comes now the defendant, Patrick J. Malone, and for his Separate Answer to the Complaint of Plaintiff herein, alleges:

I.

Admits that the Midland Loan Finance Company, a corporation, at the time of the commencement of this action, was, and still is, a corporation duly organized and existing under and by virtue of the laws of the State of Minnesota; further admits that at the time of the commencement of this action, defendant, National Surety Company, was, and still is, a corporation, duly organized and existing

under and by virtue of the laws of the State of New York; further admits that shortly prior to July 31, 1934, defendant, Patrick J. Malone, was duly designated and appointed acting postmaster at the United States post office at Montgomery, Le Sueur County, State of Minnesota; further admits that thereafter Patrick J. Malone, became the duly appointed postmaster in and for said United States Post Office, in said City of Montgomery, and duly qualified as such; further admits that Tom Hunting was engaged in the automobile business in the City of Montgomery, Minnesota, under his own name and under the name of Tom Hunting Company.

II.

Except as hereinbefore admitted, said defendant, upon the ground that he has not sufficient information wherewith [fol. 33] to form a belief, denies each and every allegation, matter and thing, in said Complaint contained, and the whole thereof, save and except insofar as is hereinafter otherwise qualified, explained or specifically denied.

III.

Defendant, Malone, further specifically denies that the injuries and other damages set forth in the complaint, was caused by any breach of duty or trust on the part of said defendant, Malone, or any wilful, negligent, or unlawful acts of said defendant, Malone, as set forth in said complaint, but alleges in truth and in fact, that any damages that may have been sustained by said plaintiff, were due wholly and solely, to the criminal acts of said Hunting as set forth in said complaint, and that said damage was proximately caused by the acts of said Hunting, and in no way caused by any neglect of duty, wilful, wrongful, or negligent acts on the part of said defendant, Malone.

IV.

Said defendant, Malone, further specifically denies, that he conspired or confederated with said Tom Hunting, as stated in plaintiff's complaint herein.

Wherefore, said defendant, Malone, prays that the pretended complaint of plaintiff herein be dismissed, and that he have his costs and disbursements incurred herein.

GEORGE T. HAVEL,
Attorney for Defendant, Malone,
Le Center, Minnesota.

Filed July 23, 1937. Margaret L. Mullane, Clerk, By Thomas H. Howard, Chief Deputy.

[fol. 34] (Reply of Plaintiff to Answer of Defendant, National Surety Corporation.)

Comes Now Midland Loan Finance Company, use-plaintiff above named, and for its reply to the separate answer of defendant National Surety Corporation:

I.

Generally and specifically denies each and every allegation, matter, statement and thing in said separate answer contained, and each and every part thereof, save and except as the same admits the allegations contained in plaintiff's complaint.

II.

Alleges that due and sufficient notice of the commencement, pendency and prosecution of this action for the use of plaintiff was given to the Postmaster General, Post Office Department and the Attorney General of the United States.

Wherefore, plaintiff prays judgment as in his complaint demanded.

Dated this 24th day of July, 1937.

LEONARD, STREET AND DEINARD,
Attorneys for Plaintiff.
1036 Andrus Building,
Minneapolis, Minnesota.

Filed July 26, 1937. Margaret L. Mullane, Clerk, By Thomas H. Howard, Chief Deputy.

[fol. 35] (Reply of Plaintiff to Answer of Defendant, Patrick J. Malone.)

Comes Now Midland Loan Finance Company, use-plaintiff above named, and for its reply to the separate answer of defendant Patrick J. Malone:

I.

Generally and specifically denies each and every allegation, matter, statement and thing in said separate answer contained, and each and every part thereof, save and except as the same admits the allegations contained in plaintiff's complaint.

Wherefore, plaintiff prays judgment as in his complaint demanded.

Dated this 24th day of July, 1937.

LEONARD, STREET AND DEINARD,
Attorneys for Plaintiff,
1036 Andrus Building,
Minneapolis, Minnesota.

Filed July 26, 1937. Margaret L. Mullane, Clerk, By Thomas H. Howard, Chief Deputy.

[fol. 36] Order Extending Time to File Bill of Exceptions.

The above plaintiff having made application for an order extending the time for signing, allowance, serving and filing of a Bill of Exceptions herein, and good cause being shown therefor, such application is hereby granted, and the time for signing, allowance, serving and filing of the Bill of Exceptions of the above named plaintiff is hereby extended up to and including September 15, 1938.

GUNNAR H. NORDBYE,
District Judge.

Date: August 15, 1938.

Filed August 15, 1938. Margaret L. Mullane, Clerk, By Thomas H. Howard, Chief Deputy.

[fol. 37] (Order further extending time to file Bill of Exceptions.)

The above plaintiff having made application for an order extending the time for signing, allowance, serving and filing of a Bill of Exceptions herein, and good cause being shown therefor, such application is hereby granted, and the time for signing, allowance, serving and filing of the Bill of Exceptions of the above named plaintiff is hereby extended up to and including October 15, 1938.

GUNNAR H. NORDBYE,
District Judge.

Dated: September 15th, 1938.

Filed September 15, 1938. Margaret L. Mullane, Clerk. By Chell M. Smith, Deputy.

[fol. 39] Bill of Exceptions.

United States District Court, District of Minnesota, Fourth Division.

United States of America, for the use and benefit of Midland Loan Finance Company, a corporation, Plaintiff,

vs.

National Surety Corporation, a corporation, and Patrick J. Malone, Defendants.

Before Honorable Gunnar H. Nordbye, District Judge, with a Jury at Law.

3681 Law.

This action was commenced in the United States District Court, District of Minnesota, Fourth Division, by the filing of a complaint at law, which by this reference is made a part hereof, and by the issuance of summons, dated October 6, 1936, which was duly served by the United States Marshal on defendant National Surety Corporation on October 6, 1936, and on defendant Patrick J. Malone on October 7, 1936.

Thereafter, demurrer to said complaint was interposed by defendant National Surety Corporation, which demurrer is by this reference made a part hereof. Demurrer to said complaint was also interposed by defendant Patrick

J. Malone, which demurrer is by this reference made a part hereof.

The issues of law raised by said demurrers thereafter duly came on to be heard and were heard before Honorable Matthew M. Joyce, one of the judges of said United [fol. 40] States District Court, on December 14, 1936, and said demurrers were overruled by order entered and filed on July 3, 1937. Said order is by this reference made a part hereof.

Thereafter, answer was interposed by defendant National Surety Corporation, which answer is by this reference made a part hereof.

Thereafter, answer was interposed by defendant Patrick J. Malone, which answer is by this reference made a part hereof.

Thereafter, plaintiff interposed reply to the separate answer of defendant National Surety Corporation, which reply is by this reference made a part hereof.

Thereafter, plaintiff interposed reply to the separate answer of defendant Patrick J. Malone, which reply is by this reference made a part hereof.

Said action being on the General Term Calendar of said District Court, came on for trial before Honorable Gunnar H. Nordbye and a jury, and the trial commenced on October 6, 1937. Plaintiff appeared by Messrs. Leonard, Street, and Deinard, Benedict Deinard, Esq., Hyman Edelman, Esq., and Leslie A. Grant, Esq., its attorneys; defendant National Surety Corporation appeared by Messrs. Doherty, Rumble, Butler, Sullivan & Mitchell, Pierce Butler, Esq. and Robert O. Sullivan, Esq., its attorneys; and defendant Patrick J. Malone appeared by George T. Havel, Esq., his attorney.

In the course of the proceedings, counsel for plaintiff did take and allege sundry exceptions to the rulings of the court, which exceptions are hereinafter set forth.

At the trial of this cause in this court at the September 1937 Term of said Court, Honorable Gunnar H. Nordbye, Judge, presided, and the following proceedings were had:

[fol. 41] A jury was impaneled and sworn according to law, and thereupon plaintiff, through its counsel, made the following opening statement to the jury:

Mr. Deinard: "If the Court please, and members of the jury: At this point it is customary for the plaintiff's attorney to make an opening statement to the jury. This opening statement is not by way of argument and is not to be taken as an argument. After the trial commences, as most of you know, the evidence is received verbally from the witnesses who will take the witness chair and recite to you such evidence as counsel proposes to offer, and such as the Court thinks is properly offered, but the evidence, as it comes in, is necessarily piece-meal. It is something like a jigsaw puzzle. One witness may be called, for instance, on one minor point about which he knows the facts; another witness is called on another minor point, and unless you have some idea to start with, of what the lawsuit is about, and what this puzzle is going to look like generally, when the pieces are put together, you will have difficulty in following the separate items of testimony; so this statement is simply by way of a bird's-eye view as to what our claim is, so that when the witnesses testify, and the documents and other exhibits are offered in evidence, you will know where they fit in the picture, what their significance is; and so the plaintiff is allowed to outline to you briefly what we claim in this case, and what we intend to show by our proof.

[fol. 42] As the Court has already indicated to you, and as most of you know, automobiles now-a-days are largely sold on time, not for cash. Cash purchasers, I think, are quite out of the ordinary. The average man buys his car on a credit basis. He pays some cash down, gets possession of the car, and agrees to pay the balance in installments, a variety of installment purchases, the same as you now go to a furniture store and buy a set of bedroom furniture, and pay so much down, and sign a contract to pay in installments. Most automobiles are bought on the same basis, and have been for some years, so that when a man buys a car from an automobile dealer he pays some cash payment, or he turns in his old car by way of a down pay-

ment, gets possession of the car, and he signs a conditional sales contract.

Sometimes he signs a note—ordinarily he does—and the note and the contract evidence his obligation to pay the balance of the purchase price of the car. I do not want to labor that point with you, because you all undoubtedly are in some respect, familiar with that situation.

Now to an ordinary automobile dealer, carrying a large number of customers on a credit basis would, of course, involve a large capital. In other words, an automobile dealer would have to be his own banker if he carried a large volume of people on credit. Therefore, over a period of some [fol. 43] years, and largely due to the increased amount of automobile business, there has developed a system whereby finance companies buy the paper from the automobile dealer, pay him out in cash for the balance of his credit payments, at some discount, whatever it happens to be, so as to make it profitable to the finance company, and the finance company carries the contract, collects the payments as they fall due, or they have certain remedies in case the purchaser does not pay up. In other words, the finance company acts as banker for the local automobile dealer so that he can do business on a credit basis with his customers.

Now when a retail dealer sells a car on a conditional sales contract in the way I have described, he retains the title to the car. Title to the car remains in the automobile dealer until the purchase price, or until all of the deferred balance of the purchase price has been paid. Then the purchaser gets a bill of sale to the car from the dealer.

When an automobile dealer sells the paper to a finance company with whom he happens to be doing business, he transfers to the finance company first of all, the contract, that is, the conditional sales contract, including the title to the car, which the finance company holds as security for the payment of the rest of the contract; and secondly, he transfers to the finance company the promissory note of the purchaser. Then the finance company takes the place of the dealer. The purchaser makes his payments to the finance company, and when the purchaser pays up, he gets his bill of sale, and the finance company surrenders his notes and surrenders the conditional sales contract.

[fol. 44] Now that, briefly, is the manner in which the automobile business is conducted in all large cities, and in the smaller towns as well. It is a general custom now, you might say, whereby automobiles are sold on installment payments.

Now when a finance company buys automobile paper, it has to be assured of several things. First of all, it wants to know that the purchaser is financially responsible, financially able to pay. Obviously, neither an automobile dealer nor a finance company wants to take a note or a contract payable in installments from somebody who is a poor financial risk, either because he has nothing to pay with, or because he is a bad moral risk; so that is the first thing they want to know.

The second thing they want to know, of course, is that there was a genuine sale, and that they are buying the notes and contract of a genuine purchaser. In other words, they want to know the fact that a real sale took place.

Next, they want to know the identity of the purchaser, and that he is a real person, and further, they want to know that he is financially responsible so that he will pay up. Otherwise they would not stay in business very long.

The finance company, of course, gets the same security that the dealer has, and just as a dealer, if he is doing business legitimately, has to know those things, whether the purchaser is any good or not, the finance company has to know the same things. Otherwise they would not buy the paper; or if they did, they would not stay in business very [fol. 45] long.

Now as a practical matter, a finance company in Minneapolis, let us say, buying automobile paper from a dealer in the southern part of the state, cannot and does not send a detective out in each case, to check up and see whether the purchaser is a real man, whether the sale was a genuine sale; that is, whether the purchaser really has possession of the car, and has bought it, and has received it, and whether he is financially reliable. The expense and the time consumed in having an expedition in each case, would make the financing business impossible as a practical matter. Therefore, all the finance companies, I think I can safely

say, have a customary way of protecting themselves, and they do it in this way.

When a dealer comes to them—let us say that Mr. Jones of Waseka comes and says, "I have five cars I have sold. I got a down payment on each one. The purchaser has the car and he is good. I want to sell those five [contract] to you," the finance company does this; first they insist on a written statement from the purchaser—a purchaser's statement, showing where the man's residence is, what his occupation is, and so on—a brief history of the same sort that you would give if you applied to a furniture store for credit. They also ask for the names of references to whom application can be made to determine whether the man is financially reliable or not.

[fol. 46] The finance company may ask for the purchaser's statement before it buys the paper. If it were an isolated transaction, a single transaction with a dealer, it would do that. If a finance company, however, is in the habit of buying paper regularly from dealers, normally the company would pay the dealer for the contract and then send out a request for credit information. At whichever time it does it, the finance company then sends out credit inquiries to the people who are listed on the purchaser's statement, with the more or less routing kind of inquiry that you are familiar with, "Does so-and-so do business at your store? Does he pay his bills promptly? Is he good? Does he owe bills all over town?" and so on. If it gets satisfactory answers, normally it is assured of the fact that the purchaser is all right. Then, to make sure, the finance company may send the little contract book to the purchaser through the mail. Let us say that Mr. Jones at Waseca says that he sold one car to a Mr. Anderson on Rural Route Number 1. The finance company then sends a copy of the contract book to him, showing the amount of the purchase, and when the payments fall due, and they send it through the mail to him. Then as the payments fall due, if they are not made promptly, the company sends notices to the purchaser, Mr. Anderson, calling his attention to the fact that the payments fall due; and ordinarily they will send him a second notice, and a summary notice, and a final notice; and in that way, through the mail, the

[fol. 47] finance company as a matter of routine, is able perfectly to keep in touch with the purchaser.

Now, obviously, if Mr. Jones of Waseca did not sell a car to Mr. Anderson, when the contract book is sent to him from Minneapolis, if he has not bought a car it will not take him long to tell the company that he is not the purchaser of the car; so in that way, as a matter of routine, the finance company is able, first of all, to investigate the credit risk; second, to get in touch with the purchasers and keep in touch with the purchasers.

I do not want to take any more time on that now, because those are things about which you are probably well advised. Now to get down to the facts in this case; there was a man by the name of Thomas Hunting, who is no longer living. He was an automobile dealer in Montgomery, Minnesota. I believe he sold Fords and Plymouths. He had been established for some years, and operated his business in the usual fashion with which you are all, at least in some measure, acquainted. The Midland Loan Finance Company of this city which we represent, was in 1933 and has been ever since, in the business of buying automobile paper in the manner which I have described. In some way, which it is not necessary now to relate, Mr. Hunting got in touch with the Midland Loan Finance Company, with the view to selling them these contracts on cars that he had sold in and around Montgomery, in the town of Montgomery and in the rural communities that are tributary to Montgomery; and starting [fol. 48] in February, 1933, he sold notes and contracts—what we ordinarily call automobile paper—to the plaintiff company in Minneapolis. That paper turned out to be perfectly satisfactory. Payments were made to the Midland Loan Finance Company on time, and the paper all worked itself out in perfectly proper fashion. They continued to do business on a slightly larger scale, through 1933 somewhat sporadically, and then in 1934 until their volume of business became rather large, and the Midland Loan Finance Company was financing Hunting to a considerable extent.

In order to protect themselves in the manner I have described, they followed the customary procedure I outlined.

either before or about the time when they purchased the contract—originally before they purchased the contract and later on, as they became more accustomed to Mr. Hunting, I believe after they gave Hunting the check—they would send out letters of inquiry to the credit references given in the purchaser's statement, and send a copy of the contract book to the purchaser. If he failed to make any payment, they sent him a notice. In this way, through the mails, they kept in touch with the purchasers.

Everything was perfectly satisfactory until April or May, 1935. At or about that time, the young lady in the Midland Loan Finance Company's office who sits back [fol. 49] there, and who will be a witness in the case, discovered to her astonishment one day, in checking over the separate card records of automobile paper that had been purchased, that they had two contracts in two different names, on the same car. In other words, the conditional sales contract of course gives the motor number and the serial number of the car. Also, their ledger records on each transaction contain that same information. More or less by accident, she happened to notice that they had two cars in two names with the same serial number and the same motor number.

This was called to the plaintiff's attention, and they made an investigation. They had a conference with Mr. Hunting, which led to nothing in particular. Then getting suspicious as to whether or not there might be something wrong, they made a further investigation through the Secretary of State's office, and discovered again, to their amazement, that of the unpaid contracts which they had purchased and still held on their books, practically all of them were fictitious sales. Out of some 82 contracts which were still left unpaid, I believe the testimony will show that 75 were not with existing people; in other words, those contracts signed by those purported people were forgeries, the names were fictitious, the credit statements were fictitious, and so on; and on the balance of the con- [fol. 50] tracts, where they were real people, the people had never purchased the car from Mr. Hunting; or if they had purchased a car, it was not the car that was transferred to the plaintiff as security on the contract.

It was a complete mystery to the plaintiff as to how this fraud could have been perpetrated on them. A representative of the company went to Montgomery to confront Hunting. Hunting confessed, and in Hunting's garage, in a desk, were found all or substantially all of the duplicate contract books mailed to the purchasers. Perhaps I should not say all, but a large number of the contract books which the plaintiff had sent to the purchasers through the mails, were found in his garage. There was also a large amount of other mail matter which had been sent from Minneapolis through the United States mails to the various purchasers. Unable to understand how that mail had turned up in Hunting's office, or in Hunting's possession, they made inquiries at the post office, and, confronted with this situation, the Postmaster admitted to the plaintiff that he had made a practice at Hunting's request, during the years 1933 and 1934 and up until that date in 1935, of delivering to Hunting's box, every piece of mail matter that came to Montgomery in an envelope bearing the name of the Midland Loan Finance Company. All mail that came to Montgomery, Minnesota, from Minneapolis, in an envelope of the Midland Loan Finance Com-
[fol. 51] pany, whether it was addressed to John Jones or John Anderson, or whoever you might chose, whether in Montgomery or in the rural delivery section, was put into Hunting's box; so that for a period of two and a half years, or so, the plaintiff had been laboring under the apprehension that the United States mails were being delivered to the people to whom it was addressed, whereas in fact all of this mail matter went to Hunting. It was all delivered to him; it all went into his box, and he was thereby enabled to fill out the credit reports as though they came from the Pure Oil Company, or the bank or from John Jones, the baker, and turn in perfectly good reports. He also received all the contract books.

Consequently the Midland Loan Finance Company never got in touch with any of the real people who had bought cars, and never learned that most of the people were fictitious people, to whom of course the mail could never have gone, and which mail, under the postal regulations, should have been returned to the Midland Loan Finance Company.

Obviously, I do not have to labor that point. If the Midland Loan Finance Company had known that any of those people were fictitious, it would not have done business with Hunting. If any of the letters had come back because of failure of delivery, the Midland Loan Finance Company would have been put on its guard, and have had an opportunity to stop the fraud, and were deprived of that by this course of conduct.

[fol. 52] Those postal regulations require the Postmaster to deliver the mail to the addressees named, unless he has a written authorization from the addressee, or the person named on the envelope, to deliver it to somebody else; and we claim and I think we shall show that the practice of Mr. Malone as Postmaster, to deliver the mail to Hunting, was, whether innocently or corruptly it matters not, in violation of the postal laws and regulations, and was the direct cause of the chain of circumstances that led to the defrauding of the plaintiff.

Mr. Malone was appointed acting postmaster sometime in 1934. He subsequently was made regular postmaster, but I do not think that concerns us. I think that during the entire period involved here, he was acting under an acting postmaster's commission. Under the laws of the United States, a postmaster is required to file a bond, written by an authorized surety company or by sureties satisfactory to the government, whereby he and his sureties bind themselves, and contract faithfully to perform the requirements of the postal laws and regulations, in substance, and by which they are made legally responsible for any damages resulting from a violation of the postal regulations.

Having discovered with reference to some $40,000.00 worth of accounts, first of all, that they were fictitious or otherwise worthless, that no recovery could be made upon them, that the plaintiff had nothing whatever out of which [fol. 53] to satisfy its claim, and having discovered as I have pointed out, that Hunting was enabled to and did perpetrate this fraud solely through the connivance of the postmaster, the plaintiff has made claim upon his bond, and is now suing on it. We claim that the damage which the Midland Loan Finance Company has sustained is the

direct consequence of Mr. Malone's misconduct in office, in failing to abide by or perform his duties under the postal laws and regulations.

Now with the items of the claim, as to how the amounts of the plaintiff's damages are computed, it is not necessary for me to go into that now. We have in court a considerable portion of the books and records of the plaintiff company, which will be introduced. Mr. Hunting is no longer alive, and it is no longer possible to have his testimony, but we shall endeavor, as quickly as possible, to present to you just how these transactions were undertaken, just what happened from time to time, what the custom of the finance company is, and I think we will demonstrate to you that the direct and immediate cause of the loss for which we are suing was the breach of the bond, and so we are asking for a verdict and judgment, both against Mr. Malone and against his surety company, the National Surety Corporation, on the bond.

Mr. Butler: May I ask a question, Mr. Deinard? Do I understand that the plaintiff does not intend to prove [fol. 54] corrupt motives on the part of Mr. Malone? I was not quite clear, from your opening statement, and I wish to know whether I am to take it that the plaintiff intends to prove or does not intend to prove corrupt motives on the part of the defendant Malone, in participation with Hunting, in the scheme to defraud?

Mr. Deinard: Well, I have no objection to stating for Mr. Butler's information, that as I have said, I think it is quite immaterial, and not being privy to the secrets of Mr. Malone's soul, I don't know. However, I intend to ask him.

Mr. Butler: I am not assuming for a moment that it is privy to any secrets, and that isn't my question. I am asking whether or not I am to understand from your opening statement to the Court of what you intend to prove—whether the Court and Jury are to understand that you do not intend to prove corrupt motives on the part of Mr. Malone as averred in your complaint, and that is all I am asking. I have a right to know. I have an issue tendered me by the complaint, and I want to know whether it will be proven.

Mr. Deinard: I would like to oblige Mr. Butler, but I don't think I can commit myself any further than I have.

[fol. 55] Mr. Butler: If your Honor, please, at the conclusion yesterday afternoon, in order to make certain that the plaintiff had in mind pressing what he stated he intended to prove, I directed a question to him as to whether he intended to prove that this Postmaster here, in acting as it is claimed that he did, acted from corrupt motives in participating with Hunting in an effort to defraud the plaintiff, or whether it is the plaintiff's claim that the Postmaster was without corrupt motives, careless or negligent merely in the performance of whatever the regulations might require. To that query the defendant received no direct answer. Your Honor will readily appreciate that it makes a difference in the defense of the case whether one is called upon to defend an action sounding in deceit or fraud, or one of negligence. The complaint sets forth one of those forms. The tender of proof to the Court suggests that another type of action will be presented. I wish, with your Honor's permission, to inquire whether this second type or whether the complaint relied upon will be proved. I think it is a fair question.

The Court: Well, as I understood Mr. Deinard's statement, he said he did not think it made any difference whether his actions were prompted by a corrupt motive or by mere careless actions. I am not in a position to have counsel amplify their opening statements. I assume they stand on their pleadings.

[fol. 56] Mr. Deinard: Well, I say, your Honor, it is not because I have any intention not to give counsel as categorical an answer as I can, but I don't know what Mr. Butler means by the use of the word 'Corruption'. So far as I am informed, now, without going through every word of the complaint, the word is not used in the complaint in connection with the defendant Malone."

At the close of the opening statement and before plaintiff offered any testimony, defendant National Surety Cor-

poration moved the court to direct a verdict in favor of defendant National Surety Corporation and against plaintiff, as follows:

(Motion of Defendant, National Surety Corporation, for Directed Verdict.)

Mr. Butler: "On the pleadings and on the opening statement of counsel, the defendant National Surety Company moves that a verdict be directed in its favor.

The Court: Motion denied and exception allowed.

Mr. Butler: I should like to state the grounds for the motion. The first ground is that the tender of proof presented to the Court presents a fatal variance between the complaint and the proof offered. That has been settled by the cases. The second ground, for the motion, is that upon the pleadings and upon the tender of proof just made by the plaintiff, no consent of the United States to the bringing of this action appears. The third ground of the motion [fol. 57] is that the regulations, the violations of which are made, in the opening statement, the basis of the action and said to be the sole cause of the damages, first, do not permit this action upon the bond; second, do not require delivery of mail as suggested by the plaintiff, and third, provides for exclusive remedy through the Postal Department for damages to persons or property in the charge of any employee of the Postal Department. Second, it appears from the opening statement that during all the time in question this man was acting Postmaster. The liability of an acting postmaster is under the regulations, merely the safe custody of government property, and no more, and the bond on which the suit is brought covers no more than the safe custody of the property of the government in the post office. The next ground of the motion is that it appears from the opening statement and from the pleadings that the damage complained of is not a consequence of any violation of any duty owed by this defendant Malone to this plantiff, but is due to the independent act of another person, an independent and possibly criminal act of another person, Hunting, now deceased.

[fol. 58] At said time defendant Patrick J. Malone also moved the court to direct a verdict in his favor and against plaintiff as follows:

Mr. Havel: "The defendant Malone joins in the motion just made.

(Arguments of counsel.)

(Jury excused from the court room during arguments of counsel.)

The Court: I will deny the motion on the grounds indicated.

Mr. Butler: Exception, please.

Mr. Havel: Exception on the part of the defendant Malone.

The Court: Have you any further matters you want to present on this motion?

Mr. Butler: Yes, I have, your Honor.

(Arguments of counsel.)

The Court: The ruling of the Court is that the motion is denied and exception allowed to both defendants."

Before any testimony was taken, defendants National Surety Corporation and Patrick J. Malone asked leave of the court to amend their answers as follows:

Mr. Sullivan: "At this time we would like to move to amend the answer of the defendant National Surety Corporation, such amendment to be as follows: to insert at the end of paragraph 4 of the present answer of the defendant, the following: This defendant hereby refers to [fol. 59] and incorporates herein by this reference, with the same force and effect as though set forth at length herein, the following duly promulgated postal laws and regulations of the United States; edition of 1932, sections 10, 415, 416, 443, 473, 777, 815, 816, 1323 and 1367, and amendments to said postal laws and regulations made by the orders of the Postmaster General of the United States as fol-

lows: Order number 3349 promulgated March 21st, 1933; order number 4579, insert number 45, promulgated November 27, 1933; order number 4579, insert number 52, promulgated November 27, 1933; order number 4620 promulgated December 6, 1933; order number 5275 promulgated April 10, 1934, and order number 5736 promulgated June 29, 1934." In that connection, the reason we are listing these particular sections of the postal regulations is this: the plaintiff has set forth in the complaint a considerable number of them, and while the law undoubtedly says that the Court will take judicial notice of the postal laws and regulations, under the authority of Cashe vs. United States, 1904, 152 U. S. 211, there are such a large number of them that we thought it advisable to specify with some particularity which sections of the postal laws and regulations and amendments thereto we thought had a pertinent bearing on the issues that most likely would be raised in this case, and it was with that in mind that we thought we had better point out with an amendment those particular sec-
[fol. 60] tions of the postal laws rather than just merely rely on the rule of judicial notice of the postal laws and regulations.

(Arguments of counsel)

The Court: Are there any objections to the motion?

Mr. Deinard: We join in the position that the Court takes judicial notice of the laws and regulations. We set them up in the complaint because they are difficult to get ahold of, and we thought it would make the complaint more intelligible. I take it the Court is not passing on the relevancy of any of them now.

The Court: No.

Mr. Deinard: Outside of that there is no objection.

Mr. Havel: I want to join in the motion on behalf of the defendant Malone, and in addition I would like to amend the answer further to include this further allegation: "the defendant further alleges that this action was commenced without the consent or authority of the United States or its Postmaster General or Postal Department, and that no consent to the prosecution and maintenance of

the action by the United States or the Postmaster General or the Postal Department has ever been granted." The surety company has alleged that in their answer, and I inadvertently neglected to put it in my answer. I would like to include or assert that defense also in behalf of the defendant Malone.

[fol. 61] Mr. Deinard: That is objected to as irrelevant because that is in the bonding company's answer, and we are going to move to strike it.

The Court: I will allow you to make such motion as will bring the question of its relevancy to the Court's attention. Both amendments may be allowed.

Mr. Deinard: I assume that since the Court takes judicial notice of them, we can supplement our pleadings or our proof with any of those amendments after we have identified them.

Mr. Butler: Surely.

The Court: Apparently that is recognized by all parties."

Thereupon, plaintiff moved the court to strike from the answer of defendant National Surety Corporation certain portions thereof as follows:

Mr. Deinard: "At this time the plaintiff moves to strike from the answer of the defendant National Surety Corporation that portion of paragraph 2 contained in the second section as follows: 'Expressly denies that said bond was for the use, benefit and protection of all persons lawfully using the United States mails, at, to, and from Montgomery, Minnesota, including plaintiffs, and on the contrary alleges that said bond was for the use, benefit and [fol. 62] protection of the United States of America only," on the ground that the same is irrelevant and does not state any defense or any defensive matter. Separately the plaintiff moves to strike that portion of the answer of the defendant National Surety Corporation contained in the first section of Paragraph 4, before the amendment proffered today, as follows: 'Alleges that this action was commenced without the consent or authority of the United

States or of its Postmaster General or Postal Department, and that no consent to the prosecution or maintenance of the action by the United States or the Postmaster General or Postal Department has ever been granted' on the ground that the same is irrelevant and does not state a defense or any defensive matter. Separately the plaintiff moves to strike from the separate answer of the defendant Patrick J. Malone the new matter offered as an amendment this afternoon, and all thereof, on the ground that the same is irrelevant and does not state any defense, or any defensive matter.

(Arguments of counsel)

The Court: I do not think we need to spend a great deal of time over this matter now. I suppose that Judge Joyce's decision must be taken as an indication, on the complaint, to the effect that it states the cause of action, and in that the right of the plaintiff to proceed against this bonding company on this bond was not a question of fact at all [fol. 63] but purely a question of law, and it seems to me that it must be conceded that Judge Joyce apparently was of the opinion that the plaintiff had a right to proceed against the surety company on this bond. What significance he attached to the letter that was presumed to be sent by the plaintiff to the Attorney General I don't know, but it is quite probable that he considered this feature, that is, that the United States might have a prior claim, or might in some way indicate that it should have preference on a recovery on this bond, and without any such indication to the plaintiff it was fair to assume that the United States had no claim, and therefore the plaintiff could proceed to recover on this bond. Now then, whether I would be required to follow Judge Joyce's ruling on that matter, I am not in a position to state. I assume generally that where one judge has ruled on a matter, that I should not be required to go over the same ground and consider the same matter that was submitted to that Court, and in the absence of exceptional circumstances, I assume I should consider that a closed question. I see no particular reason for ruling on the motions now, because after all they give rise to questions of law, and any facts that they will involve are of no great burden to either side in the preparation of the case or the defense. Now I assume that the defendants

will finally protect their record in some manner on that question, requiring me to rule, and then I will be required to rule, and that will end the matter. I do not know [fol. 64] whether it makes much difference whether I grant the motions on the theory that they do not now constitute a defense, because of Judge Joyce's ruling. That is the only ground you have for your motion. I would prefer to defer my ruling until I have acquired more information about it. I just looked at the the file before noon, and I read Judge Joyce's order. I have not read the United States case to which he refers, and I take it it will be some time before that question will come before me. At least I can defer it. My view at this time at least would be that in the absence of exceptional circumstances I should follow Judge Joyce's ruling in the matter, I have no reason to doubt that he gave it his usual careful consideration, and as to that phase of the demurrer regarding the right of the plaintiff to proceed as against this bond, if Judge Joyce did not believe that the plaintiff had a right to proceed against the bond, the demurrer should have been sustained. Often where difficulties arise, a Judge may feel that the trial court would be better equipped to rule on it, than the court to which a demurrer is submitted, but that is a question of law. If the plaintiff has no right to proceed against this bond, the demurrer should have been sustained. Therefore I will defer my ruling on the motions. I do not see that either side will be prejudiced by so doing, and I assume that the question in another way will be presented to the Court, so that I will have to rule eventually on it.

(Arguments of counsel)

[fol. 65] The Court: I might say that Mr. Heisey sent [work] to the Clerk that he would not participate in the trial, but that he would file a brief.

The Clerk: That he would make no appearance, but that he would file a brief.

(Arguments of counsel)

The Court: Well, if and when the United States indicates its views, I of course will have to consider the existence or non-existence of exceptional circumstances."

As stated by Honorable Gunnar H. Nordbye in his Order and Memorandum of May 16, 1938:

"The only indication that the Court has received as to the Government's position in the matter is a [biref] filed during the trial by the United States Attorney of this district as amicus curiae in support of the defendant surety company's position that the plaintiff has no right to bring this action on this bond."

Thereupon plaintiff, to sustain the issues upon its part and in support of the allegations contained in its complaint, offered the testimony of the following witnesses as its evidence in chief:

Herman Schlieff
Blanche Glaunert
Kenneth L. Bjornson
Robert D. Murphy
Elling A. Knutson, Secretary of State
Jerome J. Menth
Kleve J. Flakne
Abraham M. Calmenson
Milton D. Bentley

[fol. 66] None of these witnesses gave any testimony bearing on the right of plaintiff to maintain this action against defendants on defendant Patrick J. Malone's acting postmaster's bond without the express consent or permission of the United States of America to sue thereon, and therefore, the testimony of these witnesses is not set forth.

At the close of plaintiff's case in chief, counsel for defendant National Surety Corporation made a motion for directed verdict on the following grounds:

Mr. Butler: "The defendant National Surety Company asks leave to rest for the purpose of making a motion for a directed verdict with the reservation or understanding that if that motion be denied, we will have the right to reopen the case.

The Court: It may be so understood.

Mr. Butler: The defendant National Surety Company moves the Court to instruct the jury to return a verdict in its favor and against the plaintiff for that the evidence shows no causal relationship between the act of Malone, whatever it may be, and any damage suffered by the plaintiff, and for that there is no proof that Malone was responsible for the misplacement of any mail into Hunting's box, and with reference to a government post office employee the rule of respondeat superior does not apply, nor do the rules fixing responsibility upon a master for an act of a servant or employee. The only proof in that [fol. 67] respect is—

The Court: Wouldn't it be simpler for you to dictate your motion and then complete it, instead of arguing it? Then I will hear your argument.

Mr. Butler: Very good; and for that plaintiff has proved no damage attributable to the defendant Malone, for that the evidence negatives any misconduct, carelessness, neglect or violation of rules by the defendant Malone, and for that the evidence negatives any reliance or dependence upon the delivery of the mails here in question by the plaintiff in the conduct of its business insofar as the defendant Malone is concerned. The motion is also based on the ground that there is no evidence of any consent of the United States, of any officer, department or other representative thereof, to the bringing of this suit.

Mr. Sullivan: And on the further ground that on the evidence in this case there is no showing that the defendant Malone ever misdelivered any mail addressed to any of the persons covered by the exhibits A-3 to A-35 here inclusive."

At said time counsel for defendant Patrick J. Malone also made a motion for directed verdict on the following grounds:

Mr. Havel: "As attorney for the defendant Malone, reserving the right to reopen if the motion is not granted, I will also make a similar motion on the same grounds.

[fol. 68] The Court: Yes, it may be so understood.

* * * * * * * *

The Court: I will deny the motions at this time without prejudice to the renewal thereof at the close of all the testimony, and exception may be allowed to the defendants. The Court will also deny the motion to strike the testimony given by the witness Schlieff wherein he repeated alleged admissions by Malone, and an exception may be allowed to the defendants."

Thereupon defendants, to sustain the issues on their part, offered the testimony of the following witnesses as their evidence in chief:

Frank A. Barta
Ed Borak
William M. Kozel
Ed Holicky
George Redke
Mike Bendzick
M. I. Ryan
James G. Zelenka
J. L. Dvorak
J. J. Petricka
Frank Dietrich
Charles J. Bank
Mike Staetgens
Louis R. Whitesides
Joseph Wieland
Maurice A. Hessian
Herman Moll
Dan Day
A. Saxton
Henry E. Randall
Frank F. Ambrose

None of these witnesses gave any testimony bearing on the right of plaintiff to maintain this action against defendants on defendant Patrick J. Malone's acting post-[fol. 69] master's bond without the express consent or permission of the United States of America to sue thereon, and therefore, the testimony of these witnesses is not set forth.

After the close of defendants' testimony, plaintiff offered rebuttal testimony, none of which relates to the question of plaintiff's right to sue on said bond.

As part of defendants' case, the following statement was made by Mr. Benedict Deinard, one of the attorneys for plaintiff, with respect to the consent of the United States given for the commencement and maintenance of this action on defendant Patrick J. Malone's acting postmaster's bond.

The Court: "Anything further, Mr. Butler:

Mr. Butler: There is the matter that Mr. Deinard suggested that we take up with your Honor, that we would like to present.

The Court: Yes, we will take our recess at this time. The jury may be excused subject to call. He will take a few minutes recess.

(Jury leaves the court room)

(The following proceedings took place without the presence of the jury)

Mr. Deinard: Do you want me to take the stand?

Mr. Butler: I understand the situation is this; with respect to the consent of the Government to this suit, there is a stipulation that the United States has not consented to be sued. I ask, in order to enforce and dramatize the situa-
[fol. 70] tion that there be a stipulation that consent was requested and refused. Mr. Deinard has not so stipulated. I may state to the Court that there was some correspondence between Mr. Sullivan of our office and Mr. Deinard, in which Mr. Sullivan asked that any documents that they had with reference to obtaining that consent, be brought here. I am not fully familiar with the correspondence, but I think something was said about it being taken without objection to the foundation, but with Mr. Deinard's objection as to materiality. There is no need for him to take the stand if he will indicate from his files what was done to obtain consent, and what was done by the Government with respect to it.

Mr. Deinard: As a matter of fact, I want to remind Mr. Butler that the arrangement was this; in my letter to Mr. Sullivan of October 5th I said that we would produce if relevant and material, the correspondence between our office and the Washington, D. C. officials, relative to our request to institute suit, on the understanding, however, that you would likewise produce the correspondence between the National Surety Corporation and the same officials relative to the request of the National Surety Corporation for leave to defend in the name of the United States. I am not asking for that yet, but I will—

[fol. 71] Mr. Sullivan: There is no such correspondence that I know of.

Mr. Deinard: I know you don't know of it if you say so, but it is there nevertheless.

The Court: Do you intend to make up the record by statements of counsel?

Mr. Deinard: No. The bond in this case, the photostatic copy of the bond was procured from the Post Office Department. I take it you don't care about the date.

The Court: This is not for the record, Mr. Reporter.

(Statements of Court and counsel off the record.)

Mr. Butler: My understanding was that consent was asked of the Government, and that it was refused.

The Court: Do you mean by Mr. Deinard?

Mr. Butler: Well, by somebody in behalf of the Midland Loan Finance Company. I suppose somebody went to Washington about it.

Mr. Deinard: Oh no, you are wrong on that.

The Court: This is not for the record.

(Statements of Court and counsel off the record)

Mr. Deinard: In a letter from the Department of Justice dated September 22, 1936, it was stated: 'This is not a case in which a right of action accrues to the United States and which may be asserted by the United States and as to which your client has a beneficial interest, but as

stated by you, the claim is the exclusive property of your [fol. 72] client and can be asserted only by your client. The bond of the Acting Postmaster was executed in accordance with the provisions of R. S. 3834 as amended, USC, Title 39, Section 34. Whether the sureties on a bond executed in accordance with the provisions of this section are liable to your client on a claim of the nature stated by you is a question of law, which would not be affected by any ruling of the Attorney General.' Then later a copy of the order overruling this demurrer was sent to the Solicitor of the Post Office. That is all my dealings with them, Mr. Butler.

Mr. Butler: Is there anything in that letter relative to the Attorney General consenting to bringing suit in the name of the United States, or refusing to give the plaintiff permission to do so, or anything else in the files?

Mr. Deinard: Well, in this same letter he says: 'In these circumstances, therefore, it is considered that the case is not one within the control of the Attorney General and that he cannot properly take any action with reference to it'.

Mr. Butler: Prior to that has there been a request for permission to sue on the bond?

Mr. Deinard: Yes.

Mr. Butler: In the name of the United States?

Mr. Deinard: Well, before I say 'yes'—just a minute—

[fol. 73] Mr. Butler: The general question is a perfectly easy one to answer without going on the stand.

Mr. Deinard: I want to be sure of this. It is over a year ago. Yes—in my letter of July 15th, 1936, request was made of the Attorney General for authorization to commence the suit.

Mr. Butler: What was his response?

Mr. Deinard: The response I have already read to you.

Mr. Butler: Have you read all of it?

Mr. Deinard: I have read the portion of it which has to do with this question.

Mr. Butler: Is there anything relating—

Mr. Deinard: I read the portion of it relating to the consent of the United States, to our request.

Mr. Butler: Is that the only answer you ever got to your request, what you read?

Mr. Deinard: Just a minute. We have had no correspondence with a Government office with respect to the matter of consent since that letter. Since that letter I have had a personal conference with the Solicitor of the Post Office Department, but no correspondence.

Mr. Butler: That portion of that letter that you read into the record is the only response you have ever received?

[fol. 74] Mr. Deinard: Yes.

Mr. Butler: With respect to the query you addressed to the Attorney General?

Mr. Deinard: Yes.

Mr. Butler: All right. Did you verbally ask leave of the Solicitor, for permission to sue on this bond?

Mr. Deinard: No, sir. At my last conference with the Solicitor, I discussed with him at some length the decision of Judge Joyce in this case. He asked me to send him a copy of the order and I sent him the order. We made no request.

Mr. Butler: So that now we have the whole story of the Midland Loan Finance Company's attempt to get the consent of the United States, and the answers of the officers of the Government with respect to that?

Mr. Deinard: Yes, sir.

Mr. Butler: Is that correct?

Mr. Deinard: Yes, sir.

The Court: Is there anything further?

Mr. Butler: I have nothing further on that. I am perfectly willing to accept his statement on that, of that fact, without the necessity of his taking the witness stand."

[fol. 75] At the conclusion of all of the testimony defendant National Surety Corporation again renewed its motion for directed verdict in its favor and against plaintiff upon the following grounds:

The Court: "All right, gentlemen, you may proceed. Have you any motions?"

(The jury was thereupon excused and left the courtroom prior to the making of the motion).

Mr. Butler: Upon the understanding that in case this motion shall be denied, and that even though the plaintiff should make a motion for a directed verdict, that nevertheless the defendants will be permitted to go to the jury, the defendant moves for a directed verdict.

The Court: It may be so understood.

Mr. Butler: The defendant first moves that the case be dismissed for that the plaintiff is without right to sue on this bond. In case that shall be denied, the defendant moves that the cause be dismissed because even though plaintiff has a right to sue on the bond, it has no such right without the consent of the United States, which was not given. If that motion to dismiss is denied, I will submit the motion to the Court on the record already made in the case, on the files and records, and the files at the time of the demurrer and subsequent to it. The defendant National Surety Company also moves to dismiss the action for that the action is not within the jurisdiction of the District Courts of the United States. Does your Honor wish me to go on through with the motions, or shall I just discuss them now as I go along?

The Court: Well, may I suggest that you first make your motions, so that they may be completed?

[fol. 76] Mr. Butler: Very well. The defendant moves that the jury be instructed to return a verdict in its favor, and against the plaintiff, for that it appears from the evidence that the loss, if any, suffered by the plaintiff was not

due to or proximately caused by any act or omission of the defendant Malone, nor that such damage, if any, was not within the reasonable contemplation of the parties to the bond at the time of the execution thereof. The defendant also moves for a directed verdict in its favor and against the plaintiff on the ground that there is no evidence that the plaintiff is advancing money to Hunting, acted upon, in any measure or degree, the mails, their transmission or the custom of handling, or the regulations in respect thereto. Defendant moves for a verdict directed in its favor and against the plaintiff for that there is no showing of any breach of the defendant Malone of any regulation of the Post Office Department, of any law, or of any condition of his bond, and for that the acts of Malone sued upon are acts by law and postal regulation committed at the discretion and judgment of Malone, and there is no showing that any act done by Malone was not within the free and bona fide exercise of his judgment and discretion. Defendant further moves that a verdict be directed in its favor and against the plaintiff for that there is a variance between the pleadings and the proof of the plaintiff, the pleading being an attempt to state a cause of action based upon a willful wrong of the defendant Malone, alleging conspiracy [fol. 77] and participation with Hunting in Hunting's crimes, the proof being at most, if at all, of carelessness on the part of Malone. The defendant further moves that a verdict be directed in its favor and against the plaintiff for that there is no showing made upon which the defendant Malone can be charged for any wrongful act, or any act of the postal clerk Zelenka, and for that it appears that Malone was at all times an officer of the Government in the discharge of a Governmental function in relation to matters committed to his performance in the exercise of his discretion."

At the conclusion of the testimony defendant Patrick J. Malone also again renewed his motion for directed verdict in his favor and against plaintiff upon the following grounds:

(The jury was thereupon excused and left the courtroom prior to the making of the motion.)

Mr. Havel: "I would like to have the record show that the defendant Malone moves, and makes the same motions that were made by the defendant Surety Company, and in addition thereto moves further that a verdict be directed in favor of the defendant Malone on the question of proximate cause, for this reason, that the unlawful acts of Hunting intervened, which could not reasonably have been foreseen by Malone. Further, defendant Malone at this time makes a motion to strike from the complaint, all allegations charging him with any conspiracy or wrongdoing on his part, on the ground that there is no proof here to show [fol. 78] a culpable motive on the part of Malone, or any intentional wrong by him.

Mr. Butler: If your Honor please, may I add to the first motion for dismissal another alternative motion at this time, and that is, if that motion be denied, that the action be dismissed for the reason that the embodiment of the obligations of the bond is that provided in the Postal Regulations and notably that of Section 816 thereof.

The Court: Surely.

The Court: The motions for directed verdicts made by the defendants National Surety Corporation and Malone will be denied, and an exception will be allowed to such defendants. The ruling on the defendant Surety Company's motion to dismiss will be reserved."

Plaintiff stated in open court that it limited the amount of its claim aganst defendant Patrick J. Malone to the amount of the bond, i. e. $16,000.

Thereafter, counsel for plaintiff and defendants presented their arguments to the jury, and the court thereupon charged the jury.

Thereafter, and on October 29, 1937, the jury returned a verdict in favor of plaintiff and against defendants, and each of them, in the amount of $16,000. On said date, judgment was entered in favor of plaintiff and against defendants in said amount.

Thereafter, and on or about November 10, 1937, defendant National Surety Corporation moved the court for an

order dismissing plaintiff's complaint on the merits, on the following grounds:

(Motion of Defendant, National Surety Corporation, to Dismiss Complaint.)

"1. That plaintiff has no right to bring this action; that this defendant is and was under no liability or obligation to plaintiff either under the official bond of the defendant Malone as Acting Postmaster at Montgomery, Minnesota, or otherwise; that the sole party in interest [fol. 79] who may sue on or recover under said official bond is the United States of America.

2. That plaintiff has failed to show any authority, permission or consent from the United States of America to institute or maintain this action on said official bond.

3. That no authority, permission or consent was obtained by plaintiff from the United States of America to institute or maintain any action on said official bond.

4. That the United States of America declined to give plaintiff authority, permission or consent to institute or maintain this action on said official bond.

5. That the court is without jurisdiction to entertain this suit, which is one between plaintiff, a citizen and resident of the State of Minnesota, against defendant Malone, a citizen and resident of the State of Minnesota, and this defendant, a citizen and resident of the State of New York, wherein no separable controversy exists between the said defendants and plaintiff.

6. That the court is without jurisdiction to entertain this suit in that it is not one arising under the Postal Laws of the United States of America.

7. That the Postal Regulations of the United States of America, edition of 1932, particularly section 816 thereof, provides the sole, exclusive, and only method of recovery on the bond here involved, and that none of the matters [fol. 80] and things required by said Regulations to be done and performed as a prerequisite to an action on said bond has been done or performed, either by plaintiff or otherwise.

8. That the trial court, prior to the submission of the case to the jury and without prejudice to the rights of this defendant by reason of such submission, reserved for decision by the court certain questions of law properly raised by motions of this defendant, and a determination of the questions so reserved, if favorable to this defendant, requires a dismissal of this action on the merits as to this defendant."

Thereafter, and on or about November 17, 1937, defendant Patrick J. Malone moved the court for an order dismissing plaintiff's complaint on the merits, on the following grounds:

(Motion of Defendant, Patrick J. Malone, to Dismiss Complaint.)

"1. That plainitff has no right to bring this action either in the name of the United Statees of America or otherwise, in that this defendant at the times referred to in the complaint herein was under no liability or obligation to plaintiff either under this defendant's official bond as Acting Postmaster at Montgomery, Minnesota, or otherwise, and for the further reason that the United States of America is the only party in interest who may sue on or recover under the official bond of this defendant as such Acting Postmaster when and if a breach of said bond occurs.

[fol. 81] 2. That although plaintiff applied for authority, permission or consent of the United States of America to institute and maintain this action on the official bond of this defendant, the United States of America declined plaintiff's request, and in truth and in fact plaintiff is without authority, permission, or consent to institute or maintain this action on said official bond either in the name of the United States of America or otherwise.

3. That the court is without jurisdiction to entertain this suit for the following reasons:

(a) That this suit is not one arising under the Postal Laws of the United States of America;

(b) That the Postal Regulations of the United States of America, particularly Section 816 thereof, provide the sole, exclusive, and only method of recovery on the bond of this defendant as Acting Postmaster at Montgomery, Minnesota, during the times referred to in the complaint herein, and that none of the matters and things required by said Regulations to be done and performed as a prerequisite to an action on said bond has been done or performed by plaintiff, and that inasmuch as this action is based solely upon the official bond of this defendant as said Acting Postmaster all the pertinent portions of said Postal Regulations of the United States of America are incorporated in said bond with the same force and effect as though fully set forth therein;

[fol. 82] (c) That this action is one in which the diversity of citizenship of the parties plaintiff and defendant is insufficient to ground the jurisdiction of this court, in that no separable controversy exists between plaintiff and either of the defendants herein, and that the action is merely one on the official bond of this defendant as said Acting Postmaster, the essence of which is a mere contract action.

4. That the damages, if any, sustained by plaintiff by reason of the alleged breach of the official bond of this defendant cannot be said to have been within the reasonable contemplation of the parties to said bond at the time it was executed by reason of the alleged breach of said official bond are so remote that they are not recoverable either under said official bond or otherwise.

5. That the trial court, prior to the submission of this case to the jury and without prejudice to the rights of this defendant by reason of such submission, reserved for decision certain questions of law in addition to the foregoing questions specifically set forth, which said reserved questions pursuant to such reservation by the court were to be raised by this motion of defendant, and a determination by the court of such reserved questions, if favorable to this defendant, requires a dismissal of this action on the merits and a vacation of the judgment heretofore entered herein."

[fol. 83] Thereafter, said motions were duly presented and argued before Honorable Gunnar H. Nordbye, and on May 16, 1938, an order was entered granting defendant National Surety Corporation's motion to dismiss plaintiff's cause of action on its merits, which order, and memorandum accompanying the same, is by this reference made a part hereof. Plaintiff duly excepted to said order and all thereof, and exception was allowed to plaintiff by the court.

Thereafter, and on June 11, 1938, said Court, by Honorable Gunnar H. Nordbye, made and entered its supplemental order dismissing said action as to Patrick J. Malone for want of jurisdiction, which supplemental order is by this reference made a part hereof. Plaintiff duly excepted to said supplemental order and all thereof, and exception was allowed to plaintiff by the court.

Thereafter, and on June 14, 1938, judgment was entered in favor of defendant National Surety Corporation and against plaintiff, dismissing the case on the merits, and in favor of defendant Patrick J. Malone and against plaintiff, dismissing plaintiff's complaint for want of jurisdiction.

(Prayer of Plaintiff for Approval of Bill of Exceptions.)

And now, in furtherance of justice and that right may be done, plaintiff tenders and presents on September 19, 1938, within the time allowed by law, the foregoing as its Bill of Exceptions in this case, and prays that the same may be settled and allowed, and signed and sealed by the court and made a part of the record in this case.

LEONARD, STREET, and DEINARD,
Attorneys for Plaintiff,
1036 Andrus Building,
Minneapolis, Minnesota.

[fol. 84] (Stipulation of Counsel Approving Bill of Exceptions.)

It Is Hereby Stipulated by and between plaintiff through its counsel, Messrs. Leonard, Street and Deinard, and de-

fendant National Surety Corporation, a corporation, through its counsel, Messrs. Doherty, Rumble, Butler, Sullivan & Mitchell, and defendant Patrick J. Malone, through his counsel, George T. Havel, Esq., that the hereto attached Bill of Exceptions may be filed, settled and allowed by order of this Court, in connection with plaintiff's appeal to the Circuit Court of Appeals of the Eighth Circuit from the judgment of this court entered on June 14, 1938, in favor of defendant National Surety Corporation and defendant Patrick J. Malone.

Dated this 19th day of September, 1938.

LEONARD, STREET and DEINARD,
Attorneys for Plaintiff.

DOHERTY, RUMBLE, BUTLER,
SULLIVAN and MITCHELL,
Attorneys for Defendant National Surety Corporation.

GEORGE T. HAVEL,
Attorney for Defendant Patrick J. Malone.

[fol. 85] Order Allowing and Settling Bill of Exceptions.

United States District Court, District of Minnesota, Fourth Division.

United States of America, for the use and benefit of Midland Loan Finance Company, a corporation, Plaintiff,

vs.

National Surety Corporation, a corporation, and Patrick J. Malone, Defendants.

The foregoing Bill of Exceptions having been tendered and presented to me, on September 19, 1938, by Messrs. Leonard, Street, and Deinard, attorneys for plaintiff, within the time allowed by law, and it appearing that said Bill

of Exceptions has been approved by stipulation of the parties hereto filed herein,

Now Therefore, It Is Hereby Ordered and Certified that the foregoing Bill of Exceptions has been examined by me and found conformable to the truth, and contains all the evidence offered on the trial of said cause, objections, rulings, orders, decisions and other proceedings had upon said trial in connection with the issues raised by plaintiff's appeal to the Circuit Court of Appeals of the Eighth Circuit, from the judgment of this court entered on June 14, 1938, in favor of defendant National Surety Corporation and defendant Patrick J. Malone, and that the same is true, complete and properly prepared, and the same is hereby settled, allowed, and approved as the Bill of Exceptions herein, and the same is ordered to be filed and made a part of the record herein.

GUNNAR H. NORDBYE,
Judge of the United States
District Court.

Dated: September 19th, 1938.

[fol. 86] Service of the within Bill of Exceptions is hereby admitted this twelfth day of September, 1938.

DOHERTY, RUMBLE, BUTLER,
SULLIVAN & MITCHELL,
Attorneys for Defendant,
National Surety Corporation.

Service of the within Bill of Exceptions is hereby admitted this twelfth day of September, 1938.

GEORGE T. HAVEL,
Attorney for Defendant,
Patrick J. Malone.

Filed September 19, 1938. Margaret L. Mullane, Clerk, By Thomas H. Howard, Chief Deputy.

[fol. 88] (Order granting Motion of Defendant, National Surety Corporation, to dismiss, May 16, 1938.)

United States District Court, District of Minnesota, Fourth Division.

United States of America, for the use and benefit of Midland Loan Finance Company, a corporation, Plaintiff,
No. 3681 vs. Law
National Surety Corporation, a corporation, and Patrick J. Malone, Defendants.

The above-entitled cause was tried before a jury, and, at the close of all the testimony, the defendant National Surety Corporation made a motion to dismiss on the merits on certain specified grounds. The Court reserved and deferred its ruling on the motion, to which procedure no objection was made by either party. The case was submitted to the jury and a verdict was returned in favor of the plaintiff.

[fol. 89] Mr. M. J. Doherty, Mr. Pierce Butler, Jr., and Mr. R. O. Sullivan, of St. Paul, Minnesota (Messrs. Doherty, Rumble, Butler, Sullivan & Mitchell of counsel) appeared as attorneys for the defendant National Surety Corporation;

and

Messrs. Leonard, Street & Deinard, of Minneapolis, Minnesota, appeared as attorneys for the plaintiff.

The action was brought by the plaintiff, Midland Loan Finance Company, in the name of the United States as indicated above, to recover damages against the principal and surety on a postmaster's bond in the penal sum of $16,000.00, given in pursuance of Tit. 39 U. S. C. A. §34. No consent to this suit by the United States has been obtained. The complaint sought to recover the sum of $34,997.03 against the principal and $16,000.00 against the surety. Subsequently, the plaintiff limited its right of recovery against both defendants to the amount of the bond.

Plaintiff was in the automobile finance business in the city of Minneapolis. It purchased contracts of sale made by various automobile dealers in this community. One

Thomas Hunting was engaged in the automobile business at Montgomery, Minnesota, where the defendant Malone was Acting Postmaster. During the period in question, Hunting solicited plaintiff to purchase conditional sales contracts, including the promissory notes evidencing the obligation of the purchasers to pay the deferred installments thereon. It appears that Hunting became engaged in the practice of making out false and forged conditional [fol. 90] sales contracts and notes which were tendered for sale to the plaintiff. In carrying on its business with Hunting, plaintiff had a certain established practice with reference to the investigation of the purchasers named in the contracts tendered to it. Letters were mailed out by it to the credit references furnished. As soon as the contracts had been purchased, it was the custom to mail out payment books to the supposed purchasers in which were to be recorded by the plaintiff the monthly payments. Insurance certificates, receipts, etc., were also mailed out at this time to the purported purchasers. It appears that the various credit inquiries, which were generally addressed to banks, business concerns, and individuals in the vicinity of Montgomery, were sent through the United States mails and received at the Montgomery postoffice, but were seldom delivered to the persons to whom they were addressed. The evidence established that, at the request of Hunting, Malone, the postmaster, turned over to him substantially all of the mail which arrived at Montgomery in the envelopes of the plaintiff. When such mail was received by Hunting he at times would answer the credit inquiries himself, some letters were destroyed, and the inquiries which concerned actual persons, but who were not purchasers of cars, were occasionally delivered to the addressed credit references, and such references would generally respond to the plaintiff. The insurance certificates, payment books, etc., which [fol. 91] were mailed to the supposed purchasers were delivered to Hunting and retained by him. Not all of Hunting's contracts were made out to fictitious persons. Some were made out in the names of bona fide people, but the purported purchasers had not bought any cars from Hunting. It appears also that many of the cars listed in the contracts described automobiles with serial and motor numbers that were actually in existence, but the purchasers

of said cars as listed in the conditional sales contracts were either fictitious persons, or actual persons who had not in fact purchased the cars, nor had they [sined] the conditional sales contracts. In the conduct of its business with the purchasers named in the various conditional sales contracts purchased from Hunting, the plaintiff used the United States mails, but by reason of the arrangement between Hunting and the defendant Malone, the correspondence, inquiries, etc., did not reach the persons to whom the letters were addressed, but were received by Hunting instead, and in this manner he was able to dupe the plaintiff for a long period of time. In order to cover up his fraud, Hunting personally made payments to the plaintiff from time to time on the various fictitious contracts that he had sold. The evidence fairly established that plaintiff honestly believed that the contracts were bona fide, and also believed that the replies that it received from various credit references were genuine. It believed and relied upon the integrity of the United States mails and honestly assumed [fol. 92]' that the various mail matter addressed in connection with the contracts that it had purchased was being delivered to the persons to whom such mail matter was addressed. The testimony indicated that Malone knew of Hunting's business relations with the plaintiff, but it did not directly establish that Malone was knowingly a party to the fraud. Apparently, Hunting was one of the leading citizens in Montgomery, a man of rather dominant personality, and he was able to convince Malone that it was perfectly proper for the "Midland mail" to be delivered to him. However, by reason of the diversion of the mail in the manner hereinbefore described, contrary to the Postal Laws and Regulations, Hunting was able to dispose of many thousands of dollars worth of spurious contracts to the plaintiff. The jury found that Malone's wrongdoing was the direct cause of plaintiff's loss; that Malone violated his duties as postmaster; and that, as the proximate result of such violation, the plaintiff sustained a money loss at least to the extent of the penal sum of the bond, which was the amount of the verdict.

At the close of all the testimony, the defendant surety company made a motion for an order dismissing plaintiff's case on the following grounds:

"1. That plaintiff has no right to bring this action; that this defendant is and was under no liability or obligation to plaintiff either under the offici bond of the defendant Malone as Acti g Postmaster at Montgomery, Minnesota, or otherwise; that the sole party in interest who may sue on or recover under said official bond is the United States of America.

[fol. 93] "2. That plaintiff has failed to show any authority, permission or consent from the United States of America to institute or maintain this action on said official bond.

"3. That no authority, permission or consent was obtained by plaintiff from the United States of America to institute or maintain any action on said official bond.

"4. That the United States of America declined to give plaintiff authority, permission or consent to institute or maintain this action on said official bond.

"5. That the court is without jurisdiction to entertain this suit, which is one between plaintiff, a citizen and resident of the State of Minnesota, against defendant Malone, a citizen and resident of the State of Minnesota, and this defendant, a citizen and resident of the State of New York, wherein no separable controversy exists between the said defendants and plaintiff.

"6. That the court is without jurisdiction to entertain this suit in that it is not one arising under the Postal Laws of the United States of America.

"7. That the Postal Regulations of the United States of America, edition of 1932, particularly section 816 thereof, provides the sole, exclusive, and only method of recovery on the bond here involved, and that none of the matters and things required by said Regulations to be done and performed as a prerequisite to an action on said bond has been done or performed, either by plaintiff or otherwise."

It was the ruling on this motion which was deferred. The first four grounds urged by the defendant surety company in support of its motion for dismissal are the only ones that require any lengthy discussion. If plaintiff had

no right to proceed against the official bond of the postmaster to recover the damages sustained, without the approval or consent of the United States, obviously the mo-
[fol. 94] tion should be granted.

In considering the right of this plaintiff to sue on the postmaster's bond, there are certain well-recognized principles that should be considered. Where the statute provides that the obligee of an official bond shall be the United States, a third party is afforded no direct protection thereunder unless an intent to that effect can be read into the statute or statutes providing for such bond, or other statutes or regulations having bearing thereon. In absence of express language indicating such intention, the burden of proof necessarily rests upon the third party to establish his right to sue on the bond. Further, the fact that a third party has an interest in the faithful performance of the duties which the principal of the bond is required to perform, standing alone, does not establish the privity necessary to enable the third party to enforce its conditions and covenants. Washington vs. Young 10 Wheat. 406; German Alliance Ins. Co. vs. Home Water Supply Co., 226 U. S. 220; Howard vs. United States, 184 U. S. 176.

If the provisions of the pertinent statutes herein indicate the faithful fulfillment of the fiscal and fiduciary relationship between the Government and postmaster to be the primary object of the bond, it would negative any intention to embrace within its coverage any loss that the public might sustain by reason of the malfeasance or carelessness of the postmaster. It must be recognized that large sums of money are handled by this official and that it is of pri-
[fol. 95] mary importance that the Government be made secure if the breach of duty on the part of the postmaster results in loss to it. If the Government has no control over claims made against a postmaster's bond and is to be relegated to the role of an ordinary suitor without priority, its bond is of but little security. An examination of the statutes dispels any serious doubt as to the intention of Congress. It is apparent that the dominant purpose of this bond is to protect the Government. Certainly, if there are no statutory provisions which even suggest an intent to

cover private losses, such absence must be accorded great weight in determining the intendment of Congress.

The pertinent portion of Section 34, Tit. 39 U. S. C. A., which provides for a postmaster's bond, reads as follows:

"§34. Bond. Every postmaster, before entering upon the duties of his office, shall give bond, with good and approved security, and in such penalty as the Postmaster General shall deem sufficient, conditioned for the faithful discharge of all duties and trusts imposed on him either by law or the rules and regulations of the department."

Section 377, Tit. 5 U. S. C. A. provides:

"§377. Form of bonds and contracts. All bonds taken and contracts entered into by the Post Office Department shall be made to and with the United States of America."

Other statutes which have a bearing upon postmasters' bonds will be found in the footnote.*

[fol. 96] There is no provision nor intimation in the statute that the patrons of a postoffice are to be given protection by the bond to be furnished. No assurance is given to the public that it may do business with the postal system

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* "Section 35. Approval of bonds. The bonds of all postmasters may by the direction of the Postmaster General be approved and accepted, and the approval and acceptance signed by the First Assistant Postmaster General or by the Fourth Assistant Postmaster General in the name of the Postmaster General."

"Section 36. New bonds; application of payments. Whenever any postmaster is required to execute a new bond, all payments made by him after the execution of such new bond, may, if the Postmaster General or the Comptroller General deem it just, be applied first to discharge any balance which may be due from such postmaster under his old bond."

"Section 37. Deficiency in accounts; notice to sureties. When a deficiency shall be discovered in the accounts of any postmaster, who after the adjustment of his accounts fails to make good such deficiency, it shall be the duty of the General Accounting Office to notify the Postmaster General of such failure, and upon receiving such notice the Postmaster General shall forthwith deposit a notice in the postoffice at Washington, District of Columbia, addressed to the sureties respectively upon the bonds of said postmaster, at the office where he or they may reside, if known; but a failure to give or mail such notice shall not discharge such surety or sureties upon such bond."

"Section 38. Vacancies; appointment of successors; period of liability on bonds; temporary appointments. Whenever the office of any postmaster becomes vacant, the Postmaster General or the President shall supply such vacancy without delay, and the Postmaster General shall promptly notify the General Accounting Office of the change; and every postmaster and his

and have recourse to the postmaster's bond. Section 36 would indicate that in the accounting the Government's loss alone was being considered in the bond protection. Further, it will be observed that in Section 37 the Government makes provision for the notice that must be given by it to the securities of any deficiency as disclosed in the accounts of any postmaster. Nothing is said about the notice that should be given in the event any patron claims loss by reason of the postmaster's neglect. Section 38 pertains to the period of liability on a postmaster's bond and prescribes the method by which the sureties may terminate their responsibility in case there is a vacancy in the office of postmaster and delay in filling it. This section would indicate [fol. 97] that, although a postmaster's office is vacant, the sureties are not released and are responsible for the safekeeping of the public property of the postoffice and the due performance of the duties thereof. That the primary purpose of the bond is to insure the inviolability of government property is emphasized by this section. No reference is made therein to any obligation to third parties, or the circumstances under which sureties might be absolved of responsibility to them. Section 40 prescribes a three-year

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sureties shall be responsible under their bond for the safe-keeping of the public property of the post office, and the due performance of the duties thereof, until the expiration of the commission, or until a successor has been duly appointed and qualified, and has taken possession of the office; except that in cases where there is a delay of sixty days in supplying a vacancy, the sureties may terminate their responsibilty, by giving notice, in writing, to the Postmaster General, such termination to take effect ten days after sufficient time shall have elapsed to receive a reply from the Postmaster General; and the Postmaster General may, when the exigencies of the service require, place such office in charge of a special agent until the vacancy can be regularly filled; and when such special agent shall have taken charge of such postoffice, the liability of the sureties of the postmaster shall cease."

"Section 40. Release of sureties on bond. If on the settlement of the account of any postmaster it shall appear that he is indebted to the United States, and suit therefor shall not be instituted within three years after the close of such account, the sureties on his bond shall not be liable for such indebtedness."

"Section 44. Neglect to render accounts. Whenever any postmaster neglects to render his accounts for one month after the time, and in the form and manner prescribed by law and the regulations of the Postmaster General, he and his sureties shall forfeit and pay double the amount of the gross receipts at such office during any previous or subsequent equal period of time; and if, at the time of trial, no account has been rendered, they shall be liable to a penalty of such sum as the court and jury shall estimate to be equivalent thereto, to be recovered in an action on the bond."

statute of limitations on the sureties' liability where suit shall not have been initiated within three years after the close of an account indicating liability of a postmaster to the United States. Section 44 provides that the sureties shall forfeit and pay double the amount of the gross receipts in the event the postmaster neglects to render his accounts [fol. 98] for one month after the time that they shall be due. Again, it may be pointed out that this provision, in prescribing an arbitrary penalty, would seem to negative any intention that anyone but the Government shall be entitled to protection. The statutes may be searched in vain for even the slightest suggestion that an intendment exists to protect the public against loss.

It is urged that, in that Section 34 requires a bond to be conditioned for the postmaster's "faithful discharge of all duties and trusts imposed on him either by law or the rules and regulations of the department," such clause is sufficient to include the duties and trusts that a postmaster should fulfill in carrying out the obligation that he owes to the public. But, in this connection, it must be recognized that this provision does not create any scope of coverage [fol. 99] inconsistent with the defendant surety company's position that it is limited to the named obligee. Obviously, there was no duty on the part of Congress to extend the coverage to the public. If it intended that the protection be limited to the named obligee, the quoted language from the statute would be the usual and customary covenants to be incorporated in the bond. The Court does not understand that a third party has the right to sue on an official bond merely because such right has not been specifically excluded. The burden nevertheless rests upon the plaintiff to establish that such right is expressly given or necessarily implied.

Plaintiff relies upon Howard vs. United States, supra (184 U. S. 676), but the distinction between the facts of that case and the instant situation is reasonably clear. The statute governing clerks of United States courts, which office was being considered by the court, required the clerk to give a bond to the United States conditioned, "faithfully to discharge the duties of his office and seasonably to record the decrees, judgments and determinations of the

court." The decrees, judgments, etc., obviously referred to proceedings in private cases, as well as the entry of these orders in litigation instituted by the Government. Congress evidently intended that a clerk's failure timely to enter or satisfy judgments in behalf of private suitors, for instance, would constitute a breach of the bond. The dominant purpose of the statute was not to protect the Government alone. Private litigants stood on an equal footing with the Government. There is no provision in any of the [fol. 100] statutes pertaining to a postmaster's bond which conditions the bond upon the postmaster's performance of any specified or direct duty to the public. The court placed particular emphasis upon the language of the statute providing for the bond that should be given by the clerk, and it is clear that it determined that, by reason of this language, Congress intended to afford coverage to the public where it had been damnified by the clerk's breach of duty. In discussing the liability of the clerk's bondsmen to private litigants, the court stated (p. 687):

"But it is said that the bond in suit having been given to the United States, it must be deemed an instrument for the sole benefit of the Government, and therefore no suit can be maintained on it for the benefit of an individual suitor, although such suitor may have been damaged by the failure of the clerk to discharge his duty. This results, it is supposed, from the fact that there is no statute expressly authorizing such a suit. If this position be well taken, it would follow that the bonds required to be given by clerks of the Federal courts are not in any case for the protection of private suitors. We are of opinion that Congress never intended that any such condition of things should exist, but intended that the bond of a clerk should be for the protection of all suitors, public and private, and to that end authorized his bond to be increased to forty thousand dollars. It is impossible to suppose that, when requiring a clerk to give bond to the United States 'faithfully to discharge the duties of his office, and seasonably to record the decrees, judgments and determinations of the court,' Congress had in mind the interests of the United States alone, and purposely refrained from making any provision whatever for the security of private suitors in the Federal courts. Such a conclusion would be incon-

sistent with the practice of a century, and would greatly surprise the profession. As may well have been anticipated when those courts were first established, the great mass [fol. 101] of litigation in the District and Circuit Courts of the United States has always been between individuals, and consequently the words above quoted, it must be assumed, had reference to individual suitors as well as to the United States. In our opinion, the bond of the clerk is for the benefit of every suitor injured by the failure of that officer faithfully to discharge his duties or seasonably to record the decrees, judgments and determinations of the court. It must have been so understood when the courts of the United States were established and provision made for the appointment of clerks who should be entitled to receive the moneys of suitors when paid into court under its sanction or pursuant to any statute."

That there were more private than public litigants doing business with the office of clerk of court was especially true when the statute referred to in the Howard case was adopted. Private litigants directly depend upon the clerk of court faithfully to discharge the duties of his office. He owes a direct duty under the statute to private litigants. Large sums of money belonging to private suitors are often paid to the clerk. Such moneys are not paid to the Government as such. Private suitors rely upon the clerk "seasonably to record the decrees, judgments and determinations of the court." The use of this language must imply an intention on the part of Congress to permit a private claimant, who has been damaged by the clerk's malfeasance, direct recourse against the bond.

There is no showing in the Howard case that Congress had by statutory enactments provided exclusive ways and means for the Government to proceed against the sureties, or that there were statutes arbitrarily fixing the liability of the sureties to the Government, or that the [fol. 102] protection of Government property was the principal purpose of the bond. In that case, the statutory provisions and all the circumstances unmistakably indicated an intention to provide coverage for the private suitor as well as the Government, while in the instant case, every pertinent statute and circumstance, if not to the contrary, at least do not directly support the theory of coverage. The

Clerk's bond is approved by the court. He is appointed by the court and occupies a direct fiduciary relation to the public and to the Government. The bond of a postmaster is approved by the Postmaster General. Postmasters of the first, second and third classes are appointed by the President, with the advice and consent of the Senate. Elaborate provisions have been promulgated by the Postoffice Department regarding surety companies which are authorized to write bonds, the limitation on the penal sum of the bond in relation to the paidup capital and surplus of the surety, and the status and qualifications of surety companies. (Sections 69 to 72, inclusive, Postal Laws and Regulations).

It is evident that, by the adoption of various rules and regulations, the Government has endeavored to protect the public against the usual and normal losses that may occur on account of carelessness in the handling of the mails or otherwise. The payment of money to a postmaster on [fol. 103] postal savings, for instance, constitutes a direct obligation on the part of the Government to the patron. Provisions are made for registering and insuring mail matter. In Tit. 5 U. S. C. A. § 392, as amended June 22, 1934, the Government has outlined a summary method of settling claims arising by reason of the negligence and misconduct of the postmaster, where the same may be settled for less than $500.00. In Tit. 31 U. S. C. A. § 215, and also found in Section 59 (2) of the Postal Laws and Regulations, the head of the department is authorized to adjust and determine any claim on account of damages to, or loss of privately owned property where the amount of the claim does not exceed $1,000.00, caused by the negligence of any officer or employee of the Government acting within the scope of his employment. The Postal Laws and Regulations under Section 59 (2) have promulgated detailed rules covering claims for such damages. Section 790, Tit. 39 U. S. C. A. and Postal Laws and Regulations No. 233 provide means whereby the postal department may distribute moneys that have been recovered through administrative action in instances where such moneys have been stolen from the United States mails. Section 816 of the Postal Laws and Regulations provides for suits by the United States and the distribution by appropriate administrative

[fol. 104] officers of the Postoffice Department among persons damaged "by loss, rifling, damage, wrongful delivery of, or depredations upon registered or other mail, and the failure to collect or remit C. O. D. funds."

While it is true that the Government may proceed to recover on a postmaster's bond for the total loss incurred and has a moral obligation to disburse the proceeds to the parties who may have sustained the loss (U. S. Fidelity and Guaranty Co. vs. United States, 246 F. 433; United States vs. U. S. Fidelity and Guaranty Co., 247 F. 16), the right of the Government to sue on a clerk of court's bond for the benefit of the public has also been sustained in United States vs. Abeel, 174 F. 12. However, the moral obligation of the Government to protect the patrons of the postoffice who may have suffered loss, whenever it may proceed against an available fund, is entirely consistent with the apparent purpose of the statutes in question. It is the Government that must institute the proceedings. If a surplus remains after the Government has been made whole, the public has the right to expect an equitable distribution of the balance. The present suit, being instituted by a private person without the consent of the Government, would exhaust the entire bond, and such a situation cannot be reconciled with the primary purpose of the stat-[fol. 105] ute, which is to provide means whereby the losses of the Government will be first indemnified. Certainly, such circumstances have a bearing upon the ultimate interpretation which should be made with reference to the intent of Congress. With the protection afforded to the public in its dealings with postmasters, it is reasonable to assume that Congress intended that direct recourse against the bond be limited to suits by the named obligee. If the recovery requires a distribution to private claimants, it is to be assumed that the obligee will fairly and equitably perform that duty.

It may be urged that the various administrative remedies afforded to patrons who may have sustained losses are not necessarily exclusive but are merely cumulative to the right of a private claimant to proceed against the bond. However, that argument might be persuasive if there ex-

isted any apparent intention manifested by Congress to provide direct bond protection for private patrons. The regulations and administrative remedies become significant however, because they tend to support the position that, not only has the Postoffice Department, as well as Congress, assumed that no direct remedy was afforded a private citizen under a postmaster's bond, at least without the obligee's consent, but it would appear that such remedies negative the implied intention which is the basis of this suit.

Plaintiff cites and emphasizes the case of United States ex rel. Brimberg Bros. vs. Globe Indemnity Co., 26 F. (2d) [fol. 106] 191. However, in that case not only did the Attorney General of the United States authorize the suit, but Congress had authorized the Secretary of the Treasury to provide security for the owners of merchandise hauled by carriers from the wharves of the City of New York to the appraisers' stores. The transportation of this merchandise arose by reason of custom duties imposed by the Government. The Secretary of the Treasury did promulgate a regulation as required by the statute, but neglected to indicate whether the bond to be provided by the carrier should secure the merchandise as well as the revenue in which the Government was solely interested. It appeared that the owner of the merchandise sustained a loss by reason of the carelessness of the carrier, who had furnished a bond under the statute. In that a bond was required by the regulation, the court implied from all the circumstances that the Government intended to provide protection by way of the bond furnished for the owners of the merchandise, as well as the revenue. The court was of the opinion that the facts warranted an implied intent to afford the owners of the merchandise redress against the bond. In view of the facts of this case, it is not an authority for plaintiff's theory of recovery in the instant situation.

The plaintiff cites many other cases, but they are not particularly helpful, and do not depart from the principle that the intendment of coverage must be either [exress] or [fol. 107] implied. The few reported cases which have dealt with suits on a postmaster's bond have held that a mail user may not maintain an action thereon.

In Idaho Gold Reduction Co., et al. vs. Croghan, et al., 56 Pac. 164, the Supreme Court of Idaho, in sustaining a demurrer to plaintiff's complaint, stated (p. 164):

"We know of no law authorizing the bringing of suit upon a postmaster's bond by a private party. It could only be done by virtue of some statute of the United States, and we know of no such statute."

In Wile vs. U. S. Fidelity & Guaranty Co., et al., (1918) 6 Alaska 48, a postmaster who had paid a loss to the Government occasioned by the embezzlement of an assistant postmaster, sued on the bond of the assistant postmaster to recover the amount paid. The pertinent statement of the court is as follows: (p. 49):

"I cannot see that any cause of action is stated in favor of Wile against the Surety Company. There is no privity of contract between them. The bond runs to the United States of America, and by its terms is to protect the government."

In United States vs. Griswold (Ariz. 1904) 76 Pac. 596, the court was considering the right of the United States to recover the entire loss sustained by the negligence of a postmaster, regardless of its limit of liability to the patrons who sustained the loss. In upholding the right of the United States to sue for the entire loss, the court made the following observation as to the right of a third party to proceed against the bond (p. 597):

[fol. 108] "At common law suit upon an official bond must be brought and a recovery had in the name of the obligee. There is no congressional statute modifying the common law limiting the liability of sureties to suits brought by or in the name of the United States, as there is in the case of bonds given by United States marshals. In the latter case there is statutory authority authorizing any person to bring, in his own name and for his sole use, suit on the marshal's bond for a breach of its conditions. Section 784, Rev. St. U. S. (U. S. Comp. St. 1901, p. 607). It follows, therefore, that P. Sandoval & Co. could not maintain a suit

on the postmaster's bond in their own name to recover for the loss of the registered package.

"* * * To hold that the United States may not maintain an action upon the bond of the postmaster for the recovery of the entire loss sustained by the negligence of the postmaster because it was not obligated to return or make good to P. Sandoval & Co. an amount exceeding $10, would be to deny to the latter any redress unless the postmaster be personally responsible to the extent of such loss."

In 49 C. J. 1145, §56, (citing Idaho Gold Reduction Co., et al. vs. Croghan, et al., supra, and United States vs. Griswold, supra) it is said:

"But it is well settled that, in the absence of special statutory authorization, a private person cannot sue on a postmaster's official bond for moneys coming into his hands in his official capacity and lost through his negligence or default."

The following cases also tend to support the conclusion reached herein: Robins Dry Dock & Repair Co. vs. Flint, et al., 275 U. S. 303; Fosmire vs. National Surety Co., 127 N. E. 472; Clark vs. United States, 60 Ga. 156.

The Government has refused to give its consent to the bringing of this suit. The only indication that the Court has received as to the Government's position in the matter is a brief filed during the trial by the United States At-[fol. 109] torney of this district as amicus curiae in support of the defendant surety company's position that the plaintiff has no right to bring this action on this bond. The plain intendment of the statute being to provide coverage for the Government alone, it is clear that the bringing [to] this suit without the consent of the Government forecasts serious complications and threatens to destroy that which the Government has provided for its own protection. It is no answer to say that the present suit will not jeopardize the Government because the present bond has been supplanted by a new bond obtained when Malone was elevated from Acting Postmaster to Postmaster. If a private citizen has the right to sue, the entire security provided by the bond may soon be exhausted by numerous pri-

vate suits. The fact that there is an utter absence of any statutes, rules or regulations whereby the paramount right of the Government may be safeguarded, tends to substantiate the defendant surety company's position that Congress did not intend that suits of this nature could be brought without the consent of the United States. In the Howard case, consent of the United States was not given, but it was reasonably clear, in view of all the circumstances, that Congress did intend to provide direct protection for the public in dealing with clerks of court. Where Congress apparently had intended to provide protection under the bond for private litigants, the court in that case was not particularly concerned with the conflicting interests that [fol. 110] might arise between the Government and the public; that is, the failure of Congress to provide suitable machinery to protect equitably all claimants against the clerk of court's bond should not militate against the right of redress that was clearly intended for private suitors. But, in absence of such expression by Congress, the adoption of plaintiff's theory herein would subject the protection intended for the Government to a multitude of suits, which was never in the contemplation of the parties.

In Washington vs. Young, supra (10 Wheat. 406), it appears that the City of Washington was conducting a lottery and had employed a manager who had given a bond to the city. Without its consent, suit was instituted in the name of the city for the benefit of a purchaser of a lottery ticket on the ground of an alleged breach of the bond by the manager of the lottery. In the opinion rendered by the court, Chief Justice Marshall stated (p. 407):

"The first inquiry is, into the right of the proprietors of the ticket No. 1037, to sue in the name of the corporation without its consent. Their counsel insists that the bond was taken for the benefit of the fortunate adventurers in the lottery, and that each has a right to use it. * * * They have undoubtedly 'a right to apply to the corporation to direct the suit, and the corporation could not, consistently with their duty, have refused such application,' if the purpose of the bond was to secure the fortunate adverturers in the lottery, not to protect the corporation itself. But the propriety of bringing such suit was a subject on which the

obligees had themselves a right to judge. If the proprietors of one prize-ticket had an interest in this bond, the proprietors of every other prize-ticket had the same interest; and it could not be in the power of the first bond adven- [fol. 111] turer who should seize and sue upon it, to appropriate it to his own use, and to force the obligees to appear in court as plaintiffs against their own will. No person who is not the proprietor of an obligation can have a legal right to put it in suit, unless such right be given by the legislature; and no person can be authorized to use the name af another, without his assent given in fact, or by legal intendment. * * * We think, then that this case is no authority for the power claimed by the proprietors of ticket No. 1037; and we think, upon general principles, they had no right to institute this suit without the consent of the corporation. * * * The proprietors of the ticket No. 1037 have shown no right to sue on this bond. * * * But if they have, without authority, put this bond in suit, the proper course is to turn them out of court, not to render a judgment, which may bar any future suit brought by the plaintiffs, whose names have been improperly used."

In Howard vs. United States, supra (184 U. S. 676, 691) the court discussed the case of Washington vs. Young and stated:

"That case undoubtedly is authority for the proposition that, generally speaking, an obligation taken under legislative sanction cannot, in the absence of a statute so providing, be put in suit in the name of the obligee, the proprietor of the obligation, without his consent."

A fair analysis of the entire situation presented herein requires a finding that the legal intendment, which was found in the Howard case, does not exist and cannot be found in the instant proceeding. The Howard case must be limited to its particular facts. The "peculiar relation" of the clerk to the courts, as well as to the public, does not have its counterpart in the case at bar. That case does not hold that anyone injured by the conduct of an employee of the Government has the right to sue on an official bond

[fol. 112] where the United States is named as the sole obligee. It clearly upholds the principles enunciated in Washington vs. Young, supra, and German Alliance Ins. Co. vs. Home Water Supply Co., supra, that an absence of legislative intent to clothe an unnamed obligee with authority to proceed against the surety is fatal to an action on the bond instituted by him. The interest that every citizen may have at times in the faithful performance of the duties of a public employee, or the fact that damage results to him from a failure of such employee to fulfill carefully his duties, does not create the right. No third party has the right to obtain the advantage of any contract, official or otherwise, to which he is not a party, unless it can be shown that it was intended for his direct benefit.

It is highly significant that generally when it is the intention of Congress to permit private suits on bonds where the United States is named as obligee, express provision is found in the statute. Such provision will be found in the case of a bond to be furnished by a United States marshal, consular officer, or contractor performing public work for the Government. That Congress did not, under all the circumstances, intend that private parties should maintain a suit on this bond seems indisputable.

The Court is of the opinion that, if the right to sue on the bond existed, it would have jurisdiction, but a further discussion of the other grounds presented in the motion [fol. 113] becomes unnecessary in view of the conclusions indicated. It is therefore ordered that the defendant surety company's motion to dismiss plaintiff's cause of action on its merits be and the same hereby is granted. An exception is allowed to the plaintiff.

Dated this 16th day of May, 1938.

GUNNAR H. NORDBYE,
United States District Judge.

Filed May 16, 1938. Margaret L. Mullane, Clerk, By Thomas H. Howard, Chief Deputy.

[fol. 114] (Supplemental Order Dismissing Cause As To Defendant, Patrick J. Malone, June 11, 1938.)

United States District Court, District of Minnesota, Fourth Division.

United States of America, for the use and benefit of Midland Loan Finance Company, a corporation, Plaintiff,
No. 3681. vs. Law.
National Surety Corporation, a corporation, and Patrick J. Malone, Defendants.

It appearing to the Court that on the 16th day of May, 1938, it filed its order herein granting the motion of the defendant National Surety Corporation to dismiss plaintiff's cause of action against said defendant on its merits, and it further appearing that at the time said motion was heard and argued, there was presented to the Court the motion of the defendant Patrick J. Malone, who likewise made a motion to dismiss at the close of all the testimony, the ruling on which motion was also deferred, and it further appearing that if the plaintiff has no right to proceed against the surety on the bond of defendant Malone, this Court has no jurisdiction as to the defendant Patrick J. Malone in [fol. 115] the above-entitled action, now, therefore,

It Is Ordered that the above-entitled action as to Patrick J. Malone be and the same is hereby dismissed by reason of the fact that the Court has no jurisdiction. It is further ordered that the judgment heretofore entered on October 29, 1937, against the said National Surety Corporation and the said Patrick J. Malone, and each of them, be vacated and set aside, and that judgment be entered in favor of said defendants, and each of them, together with their costs and disbursements herein.

An exception is allowed to the plaintiff.

Dated this 11th day of June, 1938.

GUNNAR H. NORDBYE,
United States District Judge.

Filed June 14, 1938. Margaret L. Mullane, Clerk, By Thomas H. Howard, Chief Deputy.

[fol. 116] (Order of District Court Vacating Judgment of October 29, 1937; Judgment in favor of Defendants.)

In the District Court of the United States in and for the District of Minnesota, Fourth Division.

Term Minutes.

September Term, A. D., 1938.

Tuesday morning, June 14, 1938.

Court opened pursuant to adjournment,

Present: Honorable Gunnar H. Nordbye, Judge.

Margaret L. Mullane, Clerk,
By Thomas H. Howard, Chief Deputy.

(Before Nordbye, J.)

United States of America, for the use and benefit of Midland Loan Finance Company, a corporation, Plaintiff,
No. 3681. vs. Law.
National Surety Corporation, a corporation, and Patrick J. Malone, Defendants.

Pursuant to the supplemental order of this Court filed and entered herein on June 11, 1938, dismissing said action as to the defendant, Patrick J. Malone, vacating the judgment for plaintiff heretofore entered on October 29, 1937, and directing entry of judgment in favor of said defendants, it is now

Considered, Ordered and Adjudged: that the judgment entered herein in favor of said plaintiff as against said defendants on the 29th day of October, 1937, be and the same is hereby vacated and set aside; that said plaintiff do have and recover nothing from said defendants by reason of this its action against said defendants and that said defendants do have and recover of and from said plaintiff their costs and disbursements in this behalf expended, to be taxed, and do have execution therefor.

Further Ordered: that all further proceedings herein, except the taxation of costs and entry of judgment therefor, be and they are hereby stayed for a period of forty-two (42) days from and after this date for such further action as this plaintiff may be advised to take under the provisions of Rule XXI of this Court.

[fol. 117] Notice Of Appeal.

United States District Court, District of Minnesota, Fourth Division.

United States of America, for the use and benefit of Midland Loan Finance Company, a corporation, Plaintiff,
No. 3681. vs. Law.
National Surety Corporation, a corporation, and Patrick J. Malone, Defendants.

To Doherty, Rumble, Butler, Sullivan and Mitchell, Attorneys for Defendant National Surety Corporation, a corporation, and George T. Havel, LeCenter, Minnesota, Attorney for Defendant Patrick J. Malone:

Please Take Notice, that the above named plaintiff has appealed, and does hereby appeal, to the United States Circuit Court of Appeals for the Eighth Circuit, from the judgment of the above named Court entered on June 14, 1938, by which judgment said Court dismissed plaintiff's bill of complaint.

Said appeal is taken from the whole of said judgment and from each and every part thereof.

LEONARD, STREET and DEINARD,
Attorneys for Plaintiff,
1036 Andrus Building,
Minneapolis, Minnesota.

Due and personal service of the within Notice of Appeal is hereby admitted this 23d day of August, 1938.

DOHERTY, RUMBLE, BUTLER,
SULLIVAN & MITCHELL,
Attorneys for Defendant,
National Surety Corporation.

GEORGE T. HAVEL,
Attorney for Defendant,
Patrick J. Malone.

Filed August 29th, 1938. Margaret L. Mullane, Clerk, By Chell M. Smith, Deputy.

[fol. 118] Order Allowing Appeal.

United States District Court, District of Minnesota, Fourth Division.

United States of America, for the use and benefit of Midland Loan Finance Company, a corporation, Plaintiff,
No. 3681. vs. Law.
National Surety Corporation, a corporation, and Patrick J. Malone, Defendants.

Plaintiff herein having petitioned for an appeal to the United States Circuit Court of Appeals for the Eighth Circuit from the judgment in this cause entered June 14, 1938,

It Is Ordered that an appeal be, and hereby is, allowed to plaintiff from the judgment of this Court in this cause entered June 14, 1938 to the United States Circuit Court of Appeals for the Eighth Circuit.

It Is Further Ordered, that the Clerk of this Court prepare and certify a transcript of the record herein, or so much thereof as the parties, or either of them, may by stipulation or otherwise designate, or so much as may be designated by order of the Court, and transmit the same and file it with the United States Circuit Court of Appeals, as provided by law.

It Is Further Ordered, that said appeal shall be effective upon the filing by plaintiff of a supersedeas bond in the sum of $500, with sufficient sureties to be approved by the Court, and that upon the filing of said bond so approved, all proceedings herein be stayed and superseded during the pendency of said appeal.

GUNNAR H. NORDBYE,
United States District Judge.

Dated: August 19, 1938.

[fol. 119] Petition For Allowance of Appeal, Assignment of Errors and Prayer For Reversal.

To the Honorable United States District Court For the District of Minnesota:—

Now Comes Midland Loan Finance Company, use-plaintiff in the above entitled action (hereinafter referred to as plaintiff) and shows that on June 14, 1938, the above named District Court entered a judgment herein, in which judgment and in the proceedings prior thereto, certain errors were committed to the great prejudice of the plaintiff, which errors are hereinafter assigned in detail. Plaintiff makes the following assignments of errors, which it avers occurred in the entry of said judgment in said cause and in the proceedings prior thereto as follows:

The Court erred:

1. In entering its judgment dismissing this cause against defendants, and each of them.

2. In granting defendant National Surety Corporation's motion to dismiss plaintiff's cause of action on its merits.

3. In granting defendant Patrick J. Malone's motion to dismiss plaintiff's cause of action for lack of jurisdiction.

4. In ordering that the judgment heretofore entered in favor of plaintiff and against defendants National Surety Corporation and Patrick J. Malone, and each of them, on October 29, 1937, be vacated and set aside.

[fol. 120] 5. In holding that plaintiff had no right to bring this action against defendants, or either of them, on the acting postmaster's bond given by defendant Patrick J. Malone to the United States of America.

6. In holding that plaintiff had no right to bring this action without the consent or permission of the United States of America.

7. In holding that Midland Loan Finance Company, as a patron of the Montgomery, Minnesota, Post Office, was not one of the class of persons intended to be benefited by said postmaster's bond.

8. In holding that said acting postmaster's bond was not intended to afford any coverage or protection to plaintiff.

9. In holding that the plaintiff had no right to maintain this action against defendants, or either of them, without the consent of the United States.

10. In holding that Congress, in requiring postmaster's bonds, "did not under all the circumstances, intend that private parties should maintain a suit" thereon.

Wherefore, plaintiff prays:

1. That an appeal be allowed from said judgment and all thereof to the United States Circuit Court of Appeals for the Eighth Circuit, for the correction of said errors so complained of, and that a transcript of the record, proceedings and judgment in this cause duly authenticated, or so much thereof as the parties, or either of them, may by stipulation or otherwise designate, or so much thereof as may be designated by order of the Court, be sent to the United States Circuit Court of Appeals, and

2. That said judgment herein on account of said errors above specified, and all other manifest errors in the record in the proceedings herein be reversed, and that plaintiff be restored to all things which he has lost, or may come to lose by reason of said erroneous judgment, and for [fol. 121] such other relief as may be proper.

LEONARD, STREET and DEINARD,
Attorneys for Plaintiff,
1036 Andrus Building,
Minneapolis, Minnesota.

Dated: August 18, 1938.

Due and personal service of the within Petition, Assignments of Error and Order Allowing Appeal is hereby admitted this 23rd day of August, 1938.

DOHERTY, RUMBLE, BUTLER,
SULLIVAN & MITCHELL,
Attorneys for Defendant,
National Surety Corporation.

GEORGE T. HAVEL,
Attorney for Defendant,
Patrick J. Malone.

Filed August 29, 1938. Margaret L. Mullane, Clerk, By Chell M. Smith, Deputy.

[fol. 122] Supersedeas Bond on Appeal.

Know All Men By These Presents, That we, Midland Loan Finance Company, as principal and Saint Paul-Mercury Indemnity Company Of Saint Paul a corporation organized under the laws of the State of Delaware, as surety, are held and firmly bound unto the above named defendants, and each of them, in the sum of Five Hundred Dollars ($500), lawful money of the United States, to be paid to the said defendants, their heirs, executors, administrators, and assigns, for which payment well and truly to be made, the said principal and surety bind themselves, their heirs, personal representatives, successors, and assigns, jointly and severally by these presents.

The Condition Of This Obligation Is Such, That whereas the above named plaintiff has petitioned for and been allowed an appeal to the United States Circuit Court of Appeals for the Eighth Circuit from the judgment of this Court in this cause entered June 14, 1938.

Now, Therefore, If the said plaintiff above named shall prosecute its appeal to effect and answer all damages and costs if it fails to make its plea good, then this obligation shall be void, otherwise to remain in full force and effect.

In Testimony Whereof, The principal and surety have [fol. 123] caused this instrument to be executed this 18th day of August, 1938.

MIDLAND LOAN FINANCE COMPANY,
By Herman Schlieff, Its President.

SAINT PAUL-MERCURY INDEMNITY COMPANY OF SAINT PAUL,
By Gaylord Warner, (Seal)
Its Attorney-in-fact.

Signed, sealed and delivered
in the presence of:

Edith A. McGarvey,
Virginia A. Clarke,
As to Principal.

A. K. Johnson,
M. K. Pennington,
As to Surety.

* * *

State of Minnesota,
County of Hennepin—ss.:

On this 18 day of August, 1938, before me, a Notary Public within and for said County, personally appeared Herman Schlieff, to me personally known, who, being by me duly sworn, did say, that he is the President of the Midland Loan Finance Company, the corporation named in the foregoing instrument, and that the seal affixed to said instrument is the corporate seal of said corporation, and that the said instrument was signed and sealed in behalf of said corporation by authority of its Board of Directors and said Herman Schlieff acknowledged said instrument to be the free act and deed of said corporation.

EDITH A. McGARVEY,
Notary Public, Hennepin County, Minn.

(Notarial Seal)

My Commission Expires Nov. 11, 1944.

State of Minnesota,
County of Hennepin—ss.:

Acknowledgment of Attorney-in-Fact.

On this 18th day of August 1938, before me, a Notary Public, within and for the said County and State, personally appeared Gaylord Warner to me personally known, who being duly sworn, upon oath did say that he is the Agent and Attorney-in-Fact of and for the Saint Paul-Mercury Indemnity Company of Saint Paul, Saint Paul, Minnesota, a corporation, created, organized and existing under and by virtue of the laws of the State of Delaware, that the corporate seal affixed to the foregoing within instrument is the seal of the said Company; that the seal was affixed and the said instrument was executed by the authority of its Board of Directors; and he did also acknowledge that he executed the said instrument as the free act and deed of said Company.

M. K. PENNINGTON,
Notary Public.

(Notarial Seal)

M. K. PENNINGTON,
Notary Public, Hennepin County, Minn.
My Commission Expires May 31, 1943.

The within bond is hereby approved this 19 day of August, 1938, to operate as a supersedeas.

GUNNAR H. NORDBYE,
United States District Judge.

Due and personal service of the within bond is hereby admitted this 23rd day of August, 1938.

DOHERTY, RUMBLE, BUTLER,
SULLIVAN & MITCHELL,
Attorneys for Deft. National Surety Corporation.

GEORGE T. HAVEL,
Attorney for Deft. Patrick J. Malone.

Filed August 29th, 1938. Margaret L. Mullane, Clerk, By Chell M. Smith, Deputy.

Citation.

[fol. 124] United States District Court, District of Minnesota, Fourth Division.

United States of America, for the use and benefit of Midland Loan Finance Company, a corporation, Plaintiff,

No. 3681. vs. Law.

National Surety Corporation, a corporation, and Patrick J. Malone, Defendants.

The United States of America to the Above Named Defendants:—

You Are Hereby Cited and admonished to be and appear in the United States Circuit Court of Appeals for the Eighth Circuit, at the City of St. Louis, State of Missouri, within forty (40) days from the date hereof, pursuant to an appeal filed in the office of the Clerk of the United States District Court for the District of Minnesota, Fourth Division, in the above entitled cause, wherein the above named plaintiff is appellant, and you, the said defendants above named are appellees, and show cause if any there be, why the judgment entered in this cause on June 14, 1938, as in said appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

GUNNAR H. NORDBYE,
United States District Judge.

Dated: August 19th, 1938.

Due and personal service of the within Citation is hereby admitted this 23rd day of August, 1938.

DOHERTY, RUMBLE, BUTLER, SULLIVAN & MITCHELL,
Attorneys for Defendant National Surety Corporation.

GEORGE T. HAVEL,
Attorney for Defendant Patrick J. Malone.

Endorsed: Filed in U. S. District Court on August 29, 1938.

[fol. 126] (Order Extending Time to File Transcript.)

The above named plaintiff having made application for an order extending the time within which defendants are to appear in the United States Circuit Court of Appeals for the Eighth Circuit at the City of St. Louis, Missouri, and good cause being shown therefor,

Such application is hereby granted and the time for such appearance is hereby extended twenty (20) days from and after September 28, 1938.

GUNNAR H. NORDBYE,
Judge of United States District Court.

Dated: September 20, 1938.

Filed September 20, 1938. Margaret L. Mullane, Clerk, By Thomas H. Howard, Chief Deputy.

[fol. 127] (Clerk's Certificate to Transcript.)

United States of America, District Court of the United States, District of Minnesota, Fourth Division.

I, Margaret L. Mullane, Clerk of said District Court, do hereby certify and return to the Honorable, the United States Circuit Court of Appeals for the Eighth Circuit, that the foregoing, consisting of 126 pages, numbered consecutively from 1 to 126, inclusive, is a true and complete transcript of the record and proceedings in said cause, wherein United States of America, for the use and benefit of Midland Loan Finance Company, a Corporation, is plaintiff, and National Surety Corporation, a Corporation, and Patrick J. Malone are defendants, and of the whole thereof (except as modified by the praecipe of said plaintiff to be found at page 1 of said transcript) as appears from the original records and files of said Court; and I do hereby further certify and return that I have annexed to said transcript and included within said paging the original Citation, together with proof of service thereof.

Seal
U. S. Dist. Court
Fourth Div.
Dist. of Minn.

In Witness Whereof, I have hereunto set my hand, and affixed the seal of said Court at Minneapolis, in the District of Minnesota, this 14 day of [October] October, A. D. 1938.

MARGARET L. MULLANE,
Clerk.

By Thomas H. Howard,
Chief Deputy Clerk.

Filed Oct. 21, 1938. E. E. Koch, Clerk.

[fol. 100] And thereafter the following proceedings were had in said cause in the Circuit Court of Appeals, viz.:

(Appearance of Counsel for Appellant.)

United States Circuit Court of Appeals,
Eighth Circuit.

United States of America, for the use and benefit of Midland Loan Finance Company, Appellant,
No. 11,347. vs.
National Surety Corporation, et al.

The Clerk will enter my appearance as Counsel for the Appellant.

GEORGE B. LEONARD,
BENEDICT DEINARD,
H. E. EDELMAN,
1036 Andrus Building,
Minneapolis, Minnesota.

(Endorsed): Filed in U. S. Circuit Court of Appeals, Oct. 21, 1938.

(Appearance of Mr. M. J. Doherty, Mr. Pierce Butler, Jr., and Mr. R. O. Sullivan as Counsel for Appellees.)

The Clerk will enter my appearance as Counsel for the Appellees.

M. J. DOHERTY,
PIERCE BUTLER, JR.,
R. O. SULLIVAN,
E-1006 First Nat. Bank Bldg.,
St. Paul, Minn.

[fol. 101] (Endorsed): Filed in U. S. Circuit Court of Appeals, Oct. 27, 1938.

(Appearance of Mr. George T. Havel as Counsel for Appellees.)

The Clerk will enter my appearance as Counsel for the Appellees.

GEORGE T. HAVEL,
Attorney for Patrick J. Malone,
LeCenter, Minnesota.

(Endorsed): Filed in U. S. Circuit Court of Appeals, Jan. 21, 1939.

(Order of Submission.)

March Term, 1939.

Monday, March 20, 1939.

This cause having been called for hearing in its regular order, argument was commenced by Mr. Benedict Deinard for appellant, continued by Mr. Pierce Butler, Jr., for appellee National Surety Corporation, and by Mr. George T. Havel for appellee Patrick J. Malone, and concluded by Mr. Benedict Deinard for appellant.

Thereupon, this cause was submitted to the Court on the transcript of the record from said District Court and the briefs of counsel filed herein, with leave to appellant to file a reply brief.

[fol. 102] (Opinion.)

United States Circuit Court of Appeals,
Eighth Circuit.

No. 11,347.—March Term, A. D. 1939.

United States of America, for the use and benefit of Midland Loan Finance Company, a corporation, Appellant, vs. National Surety Corporation, a corporation, and Patrick J. Malone, Appellees.	Appeal from the District Court of the United States for the District of Minnesota.

[April 21, 1939.]

Mr. Benedict Deinard (Mr. George B. Leonard was with him on the brief) for appellant.

Mr. Pierce Butler, Jr. (Mr. Michael J. Doherty and Mr. Robert O. Sullivan were with him on the brief) for appellee, National Surety Corporation.

Mr. George T. Havel for appellee, Patrick J. Malone.

Before SANBORN, THOMAS and VAN VALKENBURGH, Circuit Judges.

THOMAS, Circuit Judge, delivered the opinion of the court.

On this appeal a single question of law is presented. It is: May a private sender of mail through the United States mails maintain an action, without the consent of the government, upon the official bond of an acting postmaster to recover consequential damages resulting from the delivery of mail to one other than the addressee without the written consent of the sender?

The lower court in an able and exhaustive opinion held that such an action can not be maintained. The motion of the surety to dismiss the complaint was sustained on the grounds that the United States is the sole party in interest entitled to sue or to recover on the bond and that the plaintiff, not having obtained the government's consent so to do, can not maintain an action in the name of the United States. *See United States, for Use and Benefit of Midland Finance Co.* v. *National Surety Corporation, et al.*, 23 F. Supp. 411. The court also dismissed the action against Malone, the principal on the bond, for lack, in the absence of the surety as a party, of the requisite diversity of citizenship to confer jurisdiction. The plaintiff assigns error directed to both rulings, but the argument in this court is addressed exclusively to the alleged errors relating to the sustaining of the surety's motion.

The material facts are not in dispute. The appellant, Midland Loan Finance Company, brought the action for its use and benefit

in the name of the United States against the principal and surety to recover the penalty of the bond in the sum of $16,000. The total alleged loss was $34,997.03. The consent of the United States to bring the suit was not obtained. The question presented was properly saved in the lower court.

The appellant is a corporation engaged in the automobile finance business at Minneapolis, Minnesota. It purchases contracts of sale from automobile dealers. Thomas Hunting was such a dealer at Montgomery, Minnesota, where the defendant Malone was acting postmaster. Hunting sold to the appellant conditional sales contracts including the installment notes of the purchasers. In submitting contracts and notes to appellant Hunting gave credit references. Appellant addressed letters to the makers of the contracts and to the credit references at Montgomery. At the request of Hunting the postmaster delivered to him substantially all of the letters received at Montgomery in appellant's envelopes. Hunting then sold to appellant spurious contracts made in the name of fictitious persons with fictitious credit references. Since he received the mail addressed to such fictitious names he was enabled to defraud the appellant of the moneys for which damage is sought in this action. It is not claimed that any of the lost funds came into the possession of the acting postmaster or that he had any knowledge of the fraud that was being perpetrated by Hunting. The appellant not only did not consent to the delivery of its letters to Hunting, but it was ignorant of the fact that they were not delivered to the persons addressed.

The bond, given by the defendants as principal and surety, bound them "to pay to the United States of America the sum of Sixteen Thousand dollars" on condition that if Malone "shall faithfully discharge all duties and trusts imposed on him as acting postmaster either by law or by the regulations of the Post Office Department, and shall perform all duties as fiscal agent of the Government imposed on him by law or by regulation of the Treasury Department made in conformity with law * * * then this obligation shall be void; otherwise, of force."

The bond was made and delivered pursuant to section 34 Title 39 U. S. C. A., which provides:

Every postmaster, before entering upon the duties of his office, shall give bond, with good and approved security, and in such

penalty as the Postmaster General shall deem sufficient, conditioned for the faithful discharge of all duties and trusts imposed on him either by law or the rules and regulations of the department.

Other pertinent statutes provide:

All bonds taken and contracts entered into by the Post Office Department shall be made to and with the United States of America. 5 U. S. C. A. §377.

All suits * * * arising under the postal laws, shall be brought in the name of the United States. 28 U. S. C. A. §732.

The Postal Laws and Regulations, Edition of 1932, provide:

Section 777 1. Mail matter should be delivered to the person addressed or in accordance with his written order.

2. When a person requests delivery to him of the mail of another, claiming that the addressee has verbally given him authority to receive it, the postmaster, if he doubts the authority, may require it to be in writing, signed and filed in his office.

Section 816 provides for recovery of loss due to wrongful delivery from the postal employee responsible therefor by the Chief Inspector by proceedings in the department, and that

7. All amounts recovered under the provisions of this section shall be paid to the United States and to the senders or owners of the mail as their interests shall appear.

It will be observed that this is not an action against the postmaster sounding in tort nor one against the United States on the theory of respondeat superior. It is an action on a bond by a stranger to the contract brought without the consent of the obligee. If it be assumed that the postmaster breached the bond by failing to require Hunting to file with him the written order of the addressees before delivering the letters in accordance with the provisions of section 777 of the Postal Regulations it does not follow that appellant is entitled to maintain the action. No federal statute authorizes such procedure; and it is the general rule that "a third person cannot sue for the breach of a contract to which he

is a stranger unless he is in privity with the parties and is therein given a direct interest." *German Alliance Insurance Co.* v. *Home Water Co.*, 226 U. S. 220, 234. This rule has frequently been invoked in determining whether a person other than the obligee named in a bond may sue for its breach. *Federal Surety Co.* v. *Minneapolis Steel & Machinery Co.*, 8 Cir., 17 F. (2d) 242; *Chicago, R. I. & P. Ry. Co.* v. *Maryland Casualty Co.*, 8 Cir., 75 F. (2d) 596, 599; *United States* v. *United States Lines*, D. C. N. Y., 24 F. Supp. 427. Generally, in the absence of some enabling statute, the obligee named in the bond is the only person entitled to maintain an action upon it. *Bowers* v. *American Surety Co.*, 2 Cir., 30 F. (2d) 244; *Washington* v. *Young*, 10 Wheat. 406; *Howard* v. *United States*, 184 U. S. 676; *Moody* v. *Megee*, D. C. Tex., affirmed by the 5th Cir. in 41 F. (2d) 515; *District of Columbia, to Use of Langellotti* v. *Fidelity & Deposit Co. of Maryland*, App. D. C., 271 F. 383; *Equitable Surety Co.* v. *Board of Commissioners*, 5 Cir., 256 F. 773, 775; *United States* v. *Abeel*, 5 Cir., 174 F. 12, 18; *United States* v. *Griswold*, (Ariz.) 76 Pac. 596 (suit on a postmasters bond); and see *Munroe* v. *Raphael*, 288 U. S. 485, 488.

In *Washington* v. *Young*, *supra*, Chief Justice Marshall said: "No person who is not the proprietor of an obligation can have a legal right to put it in suit, unless such right be given by the Legislature; and no person can be authorized to use the name of another, without his assent given in fact, *or by legal intendment*." It is the appellant's contention that, although the government has not consented to an action on the bond in the name of the United States, the obligee named therein, it has such right by virtue of "legal intendment", that is, that it was the intention of Congress, as shown by the statutes quoted supra, to confer upon the users of the United States mails the right to sue upon the bonds of postmasters in the name of the United States for the benefit of such users. To support this contention appellant relies upon the decision of the Supreme Court in *Howard* v. *United States*, *supra*. In that case it was held that a private suitor might maintain an action in the name of the United States on the bond of a clerk of a federal court executed pursuant to a federal statute and naming the United States as obligee. The clerk had embezzled funds deposited in his hands by the suitor. The court found that in view of the fact that the great mass of litigation in the federal courts was between individuals, Congress must have intended that a clerk's bond should be for the protection of both public and private suitors, and it held that consent to sue in the name

of the obligee, the United States, might be assumed to arise by legal intendment.

We are urged to find a similar legal intendment in the statute under which the bond in suit was taken. In this connection it is said that the letter of the statute confers benefits upon users of the mails as well as upon the government; that the postal regulations relating to the safe conduct of the mail are primarily for their benefit; and that the situation is similar to that in the Howard case in that the principal purpose of the postal system is to transmit private mail. We are of the opinion, however, that these considerations are outweighed by the fact that the United States has sufficient interest in the integrity of its fiscal and other relations with the numerous postal employees over the country to indicate that the statute requires a bond primarily for the government's protection. It is reasonable to presume that Congress intended primarily to protect that interest in enacting the statute requiring postmasters to give bond. The related statutes and postal regulations all point to this conclusion. No inference may be drawn from them that Congress intended to extend the protection of the bond to private mail-users. Support for these conclusions will be found in *Idaho Gold Reduction Co.* v. *Croghan,* (Ida.) 56 Pac. 164; *United States* v. *Griswold,* (Ariz.) 76 Pac. 596; 49 C. J. 1455. The plaintiff's argument and authorities fall far short of establishing the proposition that the bond in suit was required for the direct benefit of private mail-users, or that a legal intendment permitting them to sue on the bond should be read into the statute. We conclude that the dominant purpose of Congress was to provide protection to the United States.

These conclusions are not inconsistent with those decisions in which the government in actions brought in the name of the United States upon similar bonds has recovered for the theft of registered letters and the like, even in the absence of the assertion of a claim by the sender or proof of loss to the government other than the interference with its special property right as a bailee. In such cases the injury to its property right and the moral, and perhaps legal, obligation to refund the amount of the recovery to the mail-user are said to sustain a suit on the bond for the value of the lost property irrespective of the fact that the government may not be liable to the mail-user for that amount. *National Surety Co.* v. *United States,* 8 Cir., 129 F. 70; *United*

States v. *American Surety Co.*, C. C. Ill., 155 F. 941; *United States* v. *American Surety Co.*, 4 Cir., 163 F. 228; *Gibson* v. *United States*, 1st Cir., 208 F. 534; *United States Fidelity & Guar. Co.* v. *United States*, 9 Cir., 246 F. 433. Whether these authorities would sustain an action by the government in this instance need not be determined. The indirect benefit to the plaintiff, if the government may maintain such an action in its interest, does not justify the present suit. *United States* v. *United States Lines Co.*, D. C. N. Y., 24 F. Supp. 427.

The judgment is

Affirmed.

[fol. 108] (Judgment.)

United States Circuit Court of Appeals,
Eighth Circuit.

March Term, 1939.

Monday, April 24, 1939.

United States of America, for the use and benefit of Midland Loan Finance Company, a corporation, Appellant,

No. 11,347. vs.

National Surety Corporation, a corporation, and Patrick J. Malone.

Appeal from the District Court of the United States for the District of Minnesota.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Minnesota, and was argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court, in this cause, be, and the same is hereby, affirmed with costs; and that the National Surety Corporation, a corporation, and Patrick J. Malone have and recover

against the United States of America, for the use and benefit of the Midland Loan Finance Company, a corporation, the sum of Twenty Dollars for their costs herein and have execution therefor.

April 24, 1939.

United States Circuit Court of Appeals

EIGHTH CIRCUIT.

No. 11,347.

AT LAW.

UNITED STATES OF AMERICA, FOR THE USE AND BENEFIT OF MIDLAND LOAN FINANCE COMPANY, A CORPORATION,

Appellant,

vs.

NATIONAL SURETY CORPORATION, A CORPORATION; AND PATRICK J. MALONE,

Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MINNESOTA.

PETITION FOR REHEARING.

Now comes the Appellant and petitions the above named Honorable Court for a rehearing of the above entitled case on appeal.

Grounds of Petition

The grounds of this petition for rehearing are as follows:

I.

A material matter of fact and law was inadvertently overlooked by the Court, as shown by its opinion, in that the Court, in the first paragraph of the opinion, stated:

> "On this appeal a single question of law is presented. It is: May a private sender of mail through the United States mails maintain an action, *without the consent of the government*, upon the official bond of an acting postmaster to recover consequential damages resulting from the delivery of mail to one other than the addressee without the written consent of the *sender?*" (Italics supplied.)

As shown by those portions of our briefs relying upon *Howard vs. United States*, 184 U. S. 676, the appeal involves *two* questions:

1. Does a postmaster's bond, conditioned as required by 39 U. S. C. A., Sec. 31, make users of the mails, as well as the Government, beneficiaries of the bond?

2. If so, has Congress manifested intent that a user of the mails shall have the right to sue on the bond in the name of the United States, without first securing consent of an administrative officer of the Government?

We respectfully submit that it is important that these two distinct questions be kept unconfused.

It will be noted that in the *Howard Case*, *supra*, the United States Supreme Court separately treated and discussed the questions as to who were beneficiaries of the bond there sued on and as to whether a private beneficiary could sue on a

bond in which the United States was named sole obligee.

In the similar situation involved in the *Hoicard Case*, when that case was before this Court (102 Fed. 77), the Court first considered the question as to the coverage of the bond (p. 82). Then, having determined that the bond protected private persons as well as the Government, the Court considered the question as to a private person's right to sue on the bond in the name of the United States without any other consent of the United States than that evinced by the statute conferring a benefit upon private persons as well as the Government (p. 84).

We, also, submit that this Court, in the case at bar, overlooked a material matter of fact in assuming that the question presented by the appeal is limited to a case where there has been a delivery of mail to one other than the addressee "without the written consent of the *sender*." It is probable that the Court meant "addressee," instead of "sender," because Postal Regulations, Sec. 777, par. 1, provides for delivery of mail "to the person addressed or in accordance with his written order." But even then sight is lost of the fact that the lower court and a jury have found that the postmaster's wrongdoing was more serious than the mere delivery of mail without written consent of the sender or the addressee. This point more fully appears in the next ground of this petition.

II.

A material matter of fact was inadvertently overlooked by the Court, as shown by its opinion, in that the Court says of Appellee Malone's conduct as acting postmaster, that there is no showing that he "had any knowledge of the fraud that was being perpetrated by Hunting"; the Court overlooking the following stated facts found by the trial judge:

"The testimony indicated that Malone knew of Hunting's business relations with plaintiff, but it did not *directly* establish that Malone was knowingly a party to the fraud. * * * *However, by reason of the diversion of the mail in the manner hereinbefore described, contrary to the Postal Laws and Regulations, Hunting was able to dispose of many thousands of dollars worth of spurious contracts to the plaintiff. The jury found that Malone's wrongdoing was the direct cause of plaintiff's loss; that Malone violated his duties as postmaster; and that, as the proximate result of such violation, the plaintiff sustained a money loss at least to the extent of the penal sum of the bond, which was the amount of the verdict*" (Tr. p. 72, f. 92). (Italics supplied.)

It will be noted that Judge Nordbye did not find that there was no evidence establishing that Malone was knowingly a party to the fraud, but that there was no testimony *directly* establishing that fact. The record does not negative a finding by the jury on competent circumstantial evidence that Malone did know of the fraud that was being perpetrated upon appellant. And since appellees have taken no steps to review the verdict, we respectfully submit that it should be assumed, in support of the verdict, that there was ample evidence to sustain a finding of Malone's culpability.

III.

A material matter of fact and law was inadvertently overlooked by the Court, as shown by its opinion, in that the Court held that the considerations (1) that the letter of 39 U. S. C. A., Sec. 34, confers benefits upon users of the mail as well as upon the Government, (2) that the postal regulations relating to the safe conduct of the mail are primarily

for their benefit, and (3) that the principal purpose of the postal system is to transmit private mail, "are outweighed by the fact that the United States has sufficient interest in the integrity of its fiscal and other relations with the numerous postal employees over the country to indicate that the statute requires a bond *primarily* for the Government's protection." (Italics supplied.)

Without attempfing to reargue the question as to whether Congress intended that the Government and users of the mails should be co-ordinate beneficiaries on postmasters' bonds, we draw attention that the Court's conclusion "that the statute requires a bond *primarily* for the Government's protection" does not exclude our right to recover on the bond. *Primary* protection, of course, implies that there is *secondary* protection, and, in view of the fact that the Record shows that the Government has no claim on this bond and can have none, the way is clear for recovery by appellant as the only aggrieved beneficiary of the bond.

The same considerations extend to the Court's statement in the last sentence of the next to the last paragraph of its opinion: "We conclude that the *dominant* purpose of Congress was to provide protection to the United States." A dominant purpose, of course, implies the existence of one or more subordinate but important purposes.

We respectfully submit that the importance of the questions involved on this appeal not only to appellant, but also to all users of the mail, justifies a reconsideration by the Court of those questions.

GEORGE B. LEONARD,
BENEDICT DEINARD,
1036 Andrus Building,
Minneapolis, Minnesota,
Attorneys for Appellant.

CERTIFICATE

State of Minnesota,

ss.

County of Hennepin.

I, Benedict Deinard, do hereby certify that I am attorney and counsel for Appellant in the above entitled action; that the foregoing petition for rehearing is filed in good faith and is believed by me to be meritorious; and that the petition is not made vexatiously and is not made for delay.

Dated this 27th day of April, 1939.

BENEDICT DEINARD.

(Endorsed): Filed in U.S.Circuit Court of Appeals, May 1, 1939.

[fol. 115] (Order Denying Petition for Rehearing.)

May Term, 1939.

Wednesday, May 10, 1939.

The petition for rehearing filed by counsel for appellant in this cause having been considered, It is now here ordered by this Court that the same, be, and it is hereby, denied.

May 10, 1939.

[fol. 116] (Clerk's Certificate.)

United States Circuit Court of Appeals,
Eighth Circuit.

I, E. E. Koch, Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, do hereby certify that the foregoing contains the transcript of the record from the District Court of the United States for the District of Minnesota as prepared and printed under the rules of the United States Circuit Court of Appeals for the Eighth Circuit, under the supervision of its Clerk, and full, true and complete copies of all the pleadings, record entries and proceedings, including the opinion, had and filed in the United States Circuit Court of Appeals, except the full captions, titles and endorsements omitted in pursuance of the rules of the Supreme Court of the United States in a certain cause in said Circuit Court of Appeals wherein the United States of America, for the Use and Benefit of Midland Loan Finance Company, a Corporation, was Appellant and the National Surety Corporation, a Corporation, and Patrick J. Malone were Appellees, No. 11,347, as full, true and complete as the originals of the same remain on file and of record in my office.

I do further certify that on the twenty-fourth day of May, A. D. 1939, a mandate was issued out of said Circuit Court of Appeals in said cause, directed to the Judges of the District Court of the United States for the District of Minnesota.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Eighth Circuit, at office in the City of St. Louis, Missouri, this tenth day of July, A. D. 1939.

(Seal)

E. E. KOCH,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 9, 1939

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Butler took no part in the consideration and decision of this application.